FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD H. LOUDON
Counsel of Record
THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY
A Professional Corporation
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Wiston XXIV Limited Partnership filed its notice of appeal from the United States Bankruptcy Court after the court orally announced its decision from the bench, but before it formally entered the judgment on the docket sheet.

The lower courts held that the premature notice was ineffective to confer appellate jurisdiction on the district court. The question presented here is:

Should the 1994 amendment to Bankruptcy Rule 8002(b) be applied retroactively or should the trap created by the former rule be allowed to catch more unsuspecting litigants?

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No. _____

In The

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WISTON XXIV LIMITED PARTNERSHIP,

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BALCOR PENSION INVESTORS V,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Wiston XXIV Limited Partnership ("Wiston") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 28, 1994, in order to resolve the conflict between the Tenth and Ninth Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition is

unpublished by order of the Tenth Circuit. It is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed February 8, 1995, the Tenth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B, A-9.

JURISDICTION

On April 2, 1994 the United States Bankruptcy Court for the District of Kansas issued a memorandum decision rejecting Wiston's Fourth Amended Plan of Reorganization. The court orally overruled Wiston's timely-filed motion for reconsideration on April 13, 1994. On April 20, 1994 Wiston filed a notice of appeal to the United States District Court for the District of Kansas. On April 21, 1994, the bankruptcy court formally entered its order overruling Wiston's motion on the docket sheet.

The district court dismissed Wiston's appeal for lack of appellate jurisdiction. Wiston timely appealed to the Tenth Circuit, which affirmed in an opinion filed on December 28, 1994. On February 2, 1995 the Tenth Circuit denied Wiston's timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Bankruptcy Rule 8002(b), as amended in 1994, provides:

> (b) **Effect of Motion on Time for Appeal.** If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:
>
> (1) to amend to make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;
>
> (2) to alter or amend the judgment under Rule 9023;
>
> (3) for a new trial under Rule 9023; or
>
> (4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed

> by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

Fed. R. App. P. 4(a)(4), as amended in 1993, provides:

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

> (A) for judgment under Rule 50(b);
>
> (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
>
> (C) to alter or amend the judgment under Rule 59;
>
> (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;
>
> (E) for a new trial under Rule 59; or
>
> (F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of

> the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

STATEMENT OF THE CASE

The district court dismissed Wiston's appeal from the judgment of the bankruptcy court because Wiston's notice of appeal was filed prematurely. Wiston filed its notice of appeal after the bankruptcy court orally denied its motion for reconsideration, but before the court formally entered the order on the docket sheet.

The Tenth Circuit affirmed, holding that Wiston's premature filing was ineffective to confer appellate jurisdiction on the district court. The court held that because Wiston's notice of appeal was filed before August 1, 1994, the effective date of the 1994 amendment to Bankruptcy Rule 8002(b), the case was not "pending" on the effective date and therefore the appeal was properly dismissed. The court stated:

> [W]e look to the time at which the jurisdiction was to have attached: the date the appeal was filed. At no other time in the long history of this case, from the filing of the original Chapter 11

> petition to this very day, is the matter of pendency crucial at all.
>
> We conclude that this interpretation is the most rational. When Wiston made the procedural error that resulted in dismissal, the old rule was in effect and Wiston was on notice of that rule. We see no injustice in enforcing the jurisdictional requirement that governed the case at that time.

App. A, A-7 (footnote omitted).

Wiston's petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion Directly Conflicts With The Ninth Circuit's Ruling in *Arrowhead* And Is Contrary To The Liberal Policies Embodied In The Recent Amendments Of The Federal Rules of Appellate Procedure And Bankruptcy Rules

The decision below is in direct conflict with the Ninth Circuit's decision in *In re Arrowhead Estates Dev. Co.*, 43 F.2d 1306 (9th Cir. 1994). *See* App. C, A-11. Certiorari is appropriate here. *See Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1986) (Court granted petition to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion).

The Ninth Circuit in *Arrowhead* held that a notice of appeal filed after the bankruptcy court orally announced its ruling, but before formal entry on the docket sheet, was timely. The court stated that the liberal policies

embodied in the 1993 amendments to Fed. R. App. P. 4(a) should govern the court's interpretation of Bankruptcy Rule 8002(b). The court stated that its "interpretation of Bankruptcy Rule 8002 should be consistent with the amended version of FRAP 4(a), even though the parallel amendment to 8002 is not yet effective." *Id.* at 1310-11. In sharp contrast, the Tenth Circuit held that Rule 4(a) has no application here and that the amended Bankruptcy Rule does not apply to any notice of appeal filed before its effective date.

Wiston's notice of appeal would have been considered timely under the Ninth Circuit's analysis in *Arrowhead*. The 1993 amendments to Fed. R. App. P. 4(a), effective December 1, 1993, provide that "[a] notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2).

Arrowhead presents the better reasoned approach. The Advisory Committee Notes to the 1994 amendment of Bankruptcy Rule 8002(b) state that the rule was amended to *conform* to Fed. R. App. P. 4(a). Rule 4(a) was amended in 1993 to eliminate the "trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending." *See* Advisory Committee Notes to 1993 Amendments. Both rules were changed to avoid the result reached by this Court in *Acosta*, 471 U.S. 251, where the Court held that a premature notice of appeal is ineffective to confer appellate jurisdiction.

While *Arrowhead* effectuates the liberalism of the new rules, the decision below narrowly construes those rules to avoid the result intended by their amendments. The reasoning of the Tenth and Ninth Circuits creates conflicting results on virtually identical facts. In *Arrowhead* the notice was effective; in the instant case, it was not. The conflict is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DONALD H. LOUDON
Counsel of Record
THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY
A Professional Corporation
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Petitioner

APPENDIX A

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

In re: WISTON XXIV LIMITED PARTNERSHIP, Debtor.
WISTON XXIV LIMITED PARTNERSHIP, Appellant,
and
Robert L. Thompson, Wiston Management, Inc., General Partners of Wiston XXIV Limited Partnership,
v.
BALCOR PENSION INVESTORS WESTERN RESOURCES, INC., Appellees.

No. 94-3281.

United States Court of Appeals, Tenth Circuit.

Dec. 28, 1994. ORDER AND JUDGMENT[1]

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of

Before MOORE and KELLY, Circuit Judges, and KANE,[2] District Judge.

Wiston XXIV Limited Partnership appeals the order of the district court dismissing its appeal from bankruptcy court. The only issue before us is whether the district court correctly dismissed Wiston's appeal on jurisdictional grounds. Finding ourselves in agreement with that disposition, we affirm.

Debtor Wiston XXIV Limited Partnership owns an apartment complex in Johnson County, Kansas. It filed a voluntary Chapter 11 petition in 1991.

On April 2, 1994, the bankruptcy court entered a memorandum decision rejecting Wiston's Fourth Amended Plan of Reorganization. On April 6, Wiston filed a motion for reconsideration. There was a hearing on April 13, and the court orally denied the motion. The court's minutes for that day read: "Court denies the motion for reconsideration. Mr. Margolies to do Order. Debtor can file notice of appeal and motion to stay pending appeal." On April 20, the court signed the order denying Wiston's motion for reconsideration. On April 21, the order was docketed.

On April 20, without waiting for entry of the bankruptcy court's formal order, Wiston filed its notice of

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orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

[2] Honorable John L. Kane, Jr., United States Senior District Judge for the District of Colorado, sitting by designation.

appeal of the bankruptcy court's denial of the reorganization plan. On July 15, the district court dismissed Wiston's appeal as untimely. Wiston filed a motion to alter or amend judgment of the district court, which was denied.

Wiston presents three issues on appeal. It assigns error to: (1) the district court's order dismissing Wiston's appeal from bankruptcy court; (2) the bankruptcy court's order rejecting the reorganization plan; and (3) the district court's refusal to reverse the bankruptcy court's grant of relief from automatic stay. Given the district court's disposition, however, only the first issue is before us.

The district court's order of July 15, 1994, addressed only two issues: (1) the timeliness of Wiston's appeal from bankruptcy court, and (2) an apparently unrelated liquidated damages issue raised by Balcor Pension Investors V, a creditor of Wiston, in its own appeal. The order never addressed the other issues Wiston now seeks to litigate. Issues not raised before the district court should not be considered on appeal except to avoid "manifest injustice." Hernandez v. Alexander, 671 F.2d 402, 407 (10th Cir.1982). To examine the merits of Wiston's case, then, we would have to assume the application of a bright line procedural rule is "manifest injustice." To state this hypothesis is to refute it.

The district court dismissed Wiston's appeal on jurisdictional grounds. We review jurisdictional issues on bankruptcy appeals de novo. In re Reliance Equities, Inc., 966 F.2d 1338, 1340 (10th Cir.1992). What we must now resolve is whether Wiston properly invoked the district

court's jurisdiction by attempting to appeal before the bankruptcy court had decided a motion questioning the order Wiston was trying to appeal.[3]

The predicate to the district court's appellate jurisdiction in bankruptcy is that the judgment, order, or decree appealed is "final." 28 U.S.C. 158(a). To establish the requirement of finality, Wiston argues a minute sheet is the functional equivalent of a final judgment. Wiston then contends, because its notice of appeal was filed after the minute sheet was docketed the appeal was taken from a final judgment. In support, Wiston cites several Seventh and Ninth Circuit cases and "respectfully submits" that Allen v. Horinek, 827 F.2d 672 (10th Cir.1987) is "erroeous."

Contrary views of our sister circuits notwithstanding, Allen holds squarely that a minute sheet entry does not constitute an appealable final judgment. Id. at 673. "[W]hen a tolling motion is made and a notice of appeal filed before its determination, a new notice must be filed within the prescribed time measured from the date of entry of the order disposing of the motion." Id. (emphasis in original). We stated, "Section 4(a)(4) is not to be construed as permitting an appeal to be taken after announcement of the court's decision but before the entry of an order." Id.

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[3] The district court dismissed the appeal as "untimely," but, because the appeal was filed early rather than late, it was actually premature. See Allen v. Horinek, 827 F.2d 672, 672 (10th Cir.1987).

Although Wiston invites us to overrule Allen, we must decline. We are bound by the decision unless it is overruled by the en banc court. United States v. Killion, 7 F.3d 927, 930 (10th Cir.1993), cert. denied, 114 S.Ct. 1106 (1994).

In apparent anticipation of this result, Wiston argues even if the minute sheet was not a final judgment, its appeal was still timely under Bankruptcy Rule 8002(b). This rule was amended effective August 1, 1994. The earlier version provided if a post-decisional motion is filed,

> [a] notice of appeal filed before the disposition of [that motion] shall have no effect; a new notice of appeal must be filed.

Bankruptcy Rule 8002(b) (1991).

The amended version states:

> A notice of appeal filed after announcement or entry of judgment, order or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order or decree, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.

Bankruptcy Rule 8002(b) (1994).

Wiston correctly points out the advisory committee's note states this rule was amended to conform with Fed. R.App. P. 4(a)(4). The 1993 advisory committee's note to Rule 4(a)(2) states: "The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before entry of the order. . . . "

Although this is a quite convincing statement of current law, it does not reflect the law applicable to this case. Wiston's actions in bankruptcy court and the district court order being appealed both occurred before the amendment took place.

The Order of the Supreme Court creating amended Rule 8002 states, "the foregoing amendments . . . shall take effect on August 1, 1994, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending." 154 F.R.D. 412 (1994). We believe this order is dispositive.[4]

Wiston's "case" was commenced prior to the effective date of the rule. Thus, this issue turns upon whether the case was still "pending" on August 1, 1994. This is an exercise in semantics.

The district court dismissed Wiston's appeal on July 15, 1994. However, its order on Wiston's motion to alter or amend judgment is dated August 19, 1994. Further complicating analysis is the fact this appeal arises out of a pending bankruptcy case, which apparently was not affected by the district court's order.

Where, then, does the concept of a "pending case" go to find a home? Can it be anywhere but that point at

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[4] There is no relevant case law on Bankruptcy Rule 8002. Both cases cited by Balcor, Pro Football Weekly v. Gannett Co., 988 F.2d 723, 725 (7th Cir.1993), and Hashemi v. Campaigner Publications, Inc., 784 F.2d 1581, 1583-84 (11th Cir.1986), decline to apply amended rules to proceedings already commenced. But in each case, there was no question that the proceedings were already concluded.

which the matter of pendency is crucial? We think not; therefore, we look to the time at which jurisdiction was to have attached: the date the appeal was filed. At no other time in the long history of this case, from the filing of the original Chapter 11 petition to this very day is the matter of pendency crucial at all.

We conclude that this interpretation is the most rational. When Wiston made the procedural error that resulted in dismissal, the old rule was in effect, and Wiston was on notice of that rule.[5] We see no injustice in enforcing the jurisdictional requirement that governed the case at that time.

Wiston finally argues that even if its appeal was defective, we should treat it as timely under Fed. R.App. P. 2. This rule allows the court to correct defects in procedure for good cause. The advisory committee's note calls this "a general authorization to the court to relieve litigants of the consequences of default where manifest injustice would otherwise result." 1967 advisory committee's note.

However, there is an explicit exception, spelled out both in Rule 2 and in Rule 26(b), which prohibits the court from enlarging time for appeal. Fed. R.App. P. 2, 26(b). Wiston argues that we could avoid this exception by simply treating the minute sheet as a final judgment. Although we have already demenestrated that notion, we

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[5] Indeed, from our own experience we note it was commonplace for lawyers facing similar conundrums to file two notices of appeal to avoid inadvertently losing appellate jurisdiction.

observe doing so would circumvent the clear meaning of Rules 2 and 26(b).

Although Rule 2 states, "a court of appeals may . . . suspend the requirements or provisions of any of these rules. . . . ," the phrase "these rules" means the rules of appellate procedure, not the bankruptcy rules. This appeal was taken under Bankruptcy Rule 8002. Moreover, Rule 2 "suspensions" cannot overcome jurisdictional hurdles. Torres v. Oakland Scavenger Co., 108 S.Ct. 2405 (1988). Indeed, the Torres Court particularly disfavored the use of Rule 2 to enlarge the time for filing appeals. Id. at 2407. Failure to file a timely appeal is the only jurisdictional problem in the appeals process. Fed. R.App. P. 3(a). We conclude relief under Rule 2 would not be proper.

In the alternative, Wiston asks us to allow the appeal to proceed under what it terms the "unique circumstances" doctrine. In Stauber v. Kieser, 810 F.2d 1 (10th Cir.1982), we denied a motion to dismiss an untimely appeal where the appellant had detrimentally relied on the district court's erroneous grant of an extension of time to bring a post-decisional motion. In this case, the district court made no such error. We see no "unique circumstances" here.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: WISTON XXIV LIMITED PARTNERSHIP, Debtor.	)	
WISTON XXIV LIMITED PARTNERSHIP, Appellant, and	)	No. 94-3281
ROBERT L. THOMPSON; WISTON MANAGEMENT, INC., General Partners of Wiston XXIV Limited Partnership, v.	)	
BALCOR PENSION INVESTORS V, WESTERN RESOURCES, INC., Appellees.	)	

ORDER
Entered February 8, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, Circuit Judges, and KANE,* District Judge.

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*Honorable John L. Kane, Jr., United States Senior District Judge for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By /s/ L. Balzano
Deputy Clerk

APPENDIX C

In re ARROWHEAD ESTATES DEVELOPMENT CO., Debtor.
ARROWHEAD ESTATES DEVELOPMENT CO., Appellant,

v.

UNITED STATES TRUSTEE, Appellee.
In re Larry Edward Jarrett; Susanne Jarrett, Debtors.
William H. Fisher, Appellant,

v.

Larry Edward JARRETT; Susanne Jarrett, Appellees.

Nos. 93-55530, 93-56540.

United States Court of Appeals, Ninth Circuit.

Submitted on Briefs* Oct. 31, 1994.

Argued and Submitted Oct. 31, 1994.
Decided Dec. 30, 1994.

Debtor filed motion for reconsideration of order converting case from Chapter 11 to Chapter 7. The United States Bankruptcy Court for the Central District of California orally denied motion, and debtor appealed. The Bankruptcy Court subsequently entered order in its docket. The Bankruptcy Appellate Panel (BAP) dismissed appeal, and debtor appealed. In separate case, Chapter 7 debtros commenced adversary proceeding to determine validity of creditor's deed of trust and for damages

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* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a) and Ninth Circuit Rule 34.4.

against creditor for willful violation of automatic stay. The Bankruptcy Court nullified deed of trust, and creditor filed motion for reconsideration. The Bankruptcy Court orally denied motion, and creditor filed application for leave to appeal. The Bankruptcy Court subsequently entered order in its docket. The BAP ruled that it had jurisdiction to consider appeal regarding motion for reconsideration, but not to consider appeal of judgment underlying motion. Debtor appealed. The Court of Appeals, Hawkins, Circuit Judge, held that: (1) Court's interpretation of bankruptcy rule governing timeliness of notices of appeal should be consistent with amended version of federal appellate procedure rule, even though parallel amendment to bankruptcy rule was not yet effective, (2) notices of appeal filed after bankruptcy courts' oral announcement of decision, but before entry of decision, were effective.

BAP reversed and remanded on first decision; BAP affimed in part, reversed in part, and remanded on second decision.

David Seror and Thomas M. Geher, Epstein, Becker & Green, Los Angeles, CA, for appellant-debtor Arrowhead Estates Development Co.

William H. Fisher, pro se.

No appearance for the appellees.

Appeals from the Ninth Circuit Bankruptcy Appellate Panel.

Before: FLOYD R. GIBSON,** HUG, and HAWKINS, Circuit Judges.

HAWKINS, Circuit Judge:

We consider here the timing of notices of appeal. In these appeals, certain of the parties filed notices of appeal after the bankruptcy trial court rendered its oral decision but before the entry of a formal order in the court docket. Because of this timing, the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") did not reach the full merits of these appeals. Given the choice, we opt for a consideration of the parties' claims on their merits and we return them to the courts below to do just that.

In the first of these appeals, Arrowhead Estates Development Co. ("Arrowhead") appeals from an order of the BAP dismissing its appeal as untimely. In the second, William H. Fisher ("Fisher") appeals the BAP's decision that it had jurisdiction to consider his appeal regarding his motion for reconsideration, but not to consider his appeal of the judgment underlying that motion. For the reasons set forth below, we reverse the BAP's determination in Arrowhead and affirm in part and reverse in part the BAP's ruling in Jarrett. We remand both cases for further proceedings consistent with this opinion.

** Hon. Floyd R. Gibson, Senior United States Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

FACTUAL AND PROCEDURAL HISTORY

A. ARROWHEAD

On May 6, 1992, the United States Bankruptcy Court for the Central District of California entered an order converting Arrowhead's Chapter 11 reorganization petition to a Chapter 7 liquidation. Arrowhead filed a motion for reconsideration on May 15, 1992. The bankruptcy court heard and orally denied Arrowhead's motion on June 9, 1992, but this order was not entered in the court's docket until August 25, 1992. Arrowhead filed a notice of appeal to the BAP on June 16, 1992, after the court's oral ruling, but before its entry in the docket. Arrowhead did not file a new notice of appeal after the order was entered.

On March 2, 1993, the BAP dismissed the appeal concluding that it lacked jurisdiction because Arrowhead filed its notice of appeal before the entry of the formal order denying reconsideration. Arrowhead thereafter pursued this appeal on March 31, 1993. We reverse.

B. JARRETT

On April 9, 1986, Edward Fisher agreed to Loan Larry Jarrett and Arthur Clark $10,000, and they agreed to repay him $20,000 on a straight note forty-five days later. The loan was secured by a deed of trust on the Jarretts' home conveyed by Jarrett and Clark.[1] In separate

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[1] Although Clark had no interest in the Jarretts' property, he signed the deed of trust as a grantor. Fisher attempted to argue that this act constituted fraud, but the BAP concluded that

transactions on April 17 and April 25, 1986, Fisher loaned Clark an additional $25,000 and $5,000 respectively.

On June 16, 1986, Clark repaid $5,000 by personal check. On September 24, 1986, Clark gave Fisher a cashier's check for $25,000, of which Fisher retained approximately $15,000. The remaining balance of the September 24 payment was distributed to Jarrett and a third party to whom Clark owed money. Although these payments amounted to $20,000, Fisher did not release the deed of trust; instead he filed a three-day demand for payment on September 7, 1988.[2]

The Jarretts commenced a Chapter 13 filing on April 7, 1989. On May 25, Fisher sued the Jarretts and Clark in state court for fraud. On July 5, 1989, the Jarretts commenced an action in the bankruptcy court to determine the validity of Fisher's deed of trust and for damages against Fisher for willful violation of the automatic stay established by the bankruptcy laws.

After being notified by the bankruptcy court that his suit violated the automatic stay, Fisher dismissed his state court claims as to the Jarretts.[3] Fisher was not present when the trial on the deed of trust began on October 20,

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the collateral documents accompanying the deed of trust adequately identified the Jarretts as the true owners of the property.

[2] In his brief, Fisher asserted that the reason he refused to release the deed of trust was that the payments from Clark were to repay the separate loans to Clark, not to repay the deed of trust loan. We do not reach this issue, however, as it involved the merits of Fisher's appeal which are not properly before us.

[3] Fisher prevailed against Clark on the fraud claims in state court.

1989, but Fisher did attend when the trial was continued to November 9, 1989, and the court granted the Jarretts' summary judgment motion for $1,000 damages against Fisher for violation of the stay. Trial on the deed of trust was continued to December 7, 1989. Again, Fisher did not attend that proceeding.[4]

At trial, Jarrett and Clark testified that the payments made by Clark to Fisher in June and September of 1986 were intended to repay the original $20,000 debt that was secured by the deed of trust. Satisfied with this testimony, the bankruptcy court entered an order nullifying the deed of trust on December 20, 1989. Fisher moved for reconsideration of this order on December 27. The trial court heard and orally announced its denial on Fisher's motion on February 8, 1990, but this order was not entered in the court's docket until March 5. After the denial was announced, but before the entry in the docket, Fisher filed an application for leave to appeal on February 21, 1990.[5] He did not file a new notice of appeal after the order was entered.

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[4] At the hearing on his reconsideration motion, Fisher attempted to present evidence that his health prevented him from attending the trial.

[5] In its Memorandum, the BAP stated that its "practice is to treat a motion for leave to appeal as a notice of appeal where appropriate."

DISCUSSION

These appeals concern the effectiveness of a notice of appeal filed after a trial court orally announces its decision but before the formal entry of an order on the court's docket.[6]

A. ARROWHEAD

In its brief, Arrowhead first contends that the BAP's reliance on Acosta v. Louisiana Dep't of Health & Human Res., 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986), and In re Sweet Transfer & Storage, Inc., 896 F.2d 1189 (9th Cir.1990), was misplaced because those cases interpreted older and different versions of Federal Rule of Appellate Procedure ("FRAP") 4(a)(4) and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 8002(b) than are currently in force. Second, Arrowhead argues that the unique circumstances of its appeal warrant a finding that the appeal was timely. Our disposition of the first argument makes consideration of the second unnecessary.

Acosta sought to resolve a conflict in the circuits concerning the proper interpretation of FRAP 4(a). 478 U.S. at 252-253, 106 S.Ct. at 2876-77. In Calhoun v. United States, 647 F.2d 6 (9th Cir.1981), this Court held that a notice of appeal filed after the announcement but before

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[6] While this issue is not raised by Fisher's brief in Jarrett, it is a jurisdictional issue that was raised sua sponte by the BAP, and upon which its decision rests. See In re Martinez 721 F.2d 262, 264 (9th Cir.1983); Csibi v. Fustos, 670 F.2d 134, 136 n. 3 (9th Cir.1982) (per curiam).

the entry of a decision on a motion for reconsideration was effective. According to Calhoun, "the word 'disposition' means announcement of the court's decision on the motion." Id. at 10. The Fifth Circuit, on the other hand, held the view that a notice of appeal filed any time before the entry of the court's decision is premature and has no effect. Acosta v. Louisiana Health & Human Res., 776 F.2d 1046 (5th Cir.1985) (table); see also Ross v. Global Marine, Inc., 859 F.2d 336, 340 (5th Cir.1988).

To resolve this conflict, the Supreme Court relied on the portion of FRAP 4(a)(4) that provided: "A notice of appeal filed before the disposition of [a motion for reconsideration] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." The Court held that the Calhoun decision failed to comport "with the plain wording of the Rules." Acosta, 478 U.S. at 253, 106 S.Ct. at 2877. Additionally, the Court noted FRAP 4(a)(2)'s statement that " '[e]xcept as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.' " Id. at 254, 106 S.Ct. at 2877-78 (emphasis in original). Calhoun's interpretation, said the Court, would effectively read this exception out of the Rule. Id.

In Sweet Transfer, 896 F.2d at 1189, this Court considered the effect of Acosta on our interpretation of Bankruptcy Rule 8002. We pointed out that Rule 8002(b) historically has been construed to be consistent with FRAP 4(a)(4), so Acosta controlled the issue of timeliness in bankruptcy appeals. Id. at 1192. Additionally, we

stated that "given the stricter language of the bankruptcy rule (there is no equivalent to Fed.R.App.P. 4(a)(2) in BR 8002) it should not be construed more liberally." Id.

However, in 1991, Bankruptcy Rule 8002(a) was amended to provide that "[a] notice of appeal filed after the announcement of a decision or order but before the entry of the judgment, order, or decree shall be treated as filed after such entry and on the date thereof." The purpose of this amendment was "to conform with rule 4(a)(2) which is designed to avoid the loss of the right to appeal when a notice of appeal is filed prematurely." Bankruptcy Rule 8002(a) (Advisory Committee's note to 1991 amendment). Thus, it appears that Sweet Transfer's concerns regarding liberally construing Bankruptcy Rule 8002 were resolved by that amendment.[7]

Additionally, a recent amendment to FRAP 4(a) essentially enacts the Calhoun interpretation of the Rule. The amendment eliminated the exception language from FRAP 4(a)(2), making the provision that "[a] notice of appeal filed after the court announces a decision or order but before entry of the judgment or order is treated as filed on the date of and after entry" applicable to all judgments, even those concerning the motions enumerated in Rule 4(a)(4).[8] Moreover, subparagraph (a)(4) was also amended to provide:

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[7] Bankruptcy Rule 8002(a), as amended, contains no corollary to the exception in FRAP 4(a)(2) relied upon in Acosta. Therefore, Bankruptcy Rule 8002(a) is actually more flexible than was FRAP 4(a)(2) at the time of Sweet Transfer.

[8] The language deleted by the amendment was the same language Acosta held that Calhoun was reading out of the Rule. See Acosta, 478 U.S. at 254, 106 S.Ct. at 2877-78.

> (4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: [several enumerated motions follow, including a motion to alter or amend the judgment under Rule 59, which can encompass a motion for reconsideration].
>
> A notice of appeal filed after announcement of the judgment of but before the disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.

Fed.R.App.P. 4(a)(4) (emphasis added).

The purpose of the amendment was to eliminate a "trap [created] for an unsuspecting litigant who files a notice of appeal" before the disposition of a post trial motion. Fed.R.App.P. 4(a)(4) (Advisory Committee's note to 1993 amendment). "Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule." Id. This "trap" is exactly what caught Arrowhead, and caused the BAP to dismiss its appeal.

This Court's interpretation of Bankruptcy Rule 8002 should be consistent with the amended version of FRAP 4(a), even though the parallel amendment to 8002 is not

yet effective.[9] We have held that "we should construe Bankruptcy Rule 802 [now 8002] in the same manner as we do Appellate Rule 4(a). The policies underlying the federal rules would not be advanced by a contrary result." In re Brickyard, 735 F.2d 1154, 1156 (9th Cir.1984); see also In re Magouirk, 693 F.2d 948, 951 (9th Cir.1982); In re Estate of Butler's Tire & Battery Co., 592 F.2d 1028, 1031 (9th Cir.1979); In re Brandig Iron Steak House, 536 F.2d 299, 301 n. 1 (9th Cir.1976). It follows then, that the result in this case should not be inconsistent with the amended version of Rule 4(a).

That the amendment to FRAP 4(a) became effective after Arrowhead lodged its appeal does not preclude application of the amended rule to this case.[10] While there is often a presumption against retroactive application of new legislation to pending cases, this presumption generally does not apply to rules conferring or withdrawing jurisdiction. Landgraf v. USI Film Prods., ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " Id. at ___, 114 S.Ct. at 1502 (quoting Republic Nat'l Bank v. United States, ___ U.S. ___, ___, 113 S.Ct. 554, 565, 121 L.Ed.2d

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[9] An amendment to Bankruptcy Rule 8002(b) that would conform to the new amendment of FRAP 4(a)(4) has been proposed, but is not yet effective. See Proposed Amendments to the Federal Rules of Bankruptcy Procedure, Rule 8002.

[10] The BAP entered its Order of Dismissal on March 2, 1993, and Arrowhead filed its notice of Appeal to this Court on March 31, 1993. The amendment to FRAP 4 became effective on December 1, 1993.

474 (1992) (Thomas, J. concurring)); see also Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978); Order Amending Bankruptcy Rules and Forms, 421 U.S. 1021 (1975). Additionally, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Landgraf, ___ U.S. at ___, 114 S.Ct. at 1502.

B. JARRETT

A motion for reconsideration may be brought under either Fed.R.Civ.P. ("FRCP") 9(e) or 60(b). School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir.1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994). Since Fisher did not specify which rule supported his motion, the BAP considered the denial of the motion under both standards. See id. at 1262-63.

The BAP first analyzed the motion under FRCP 59(e), and held that "[p]ursuant to Rule 8002(b), when a tolling motion is made, a new notice of appeal must be filed after disposition of the motion in order to perfect an appeal from the underlying judgment." Because Fisher filed his application for leave to appeal after the oral announcement but before the entry of the bankruptcy court's decision, the BAP held that the appeal was untimely under Bankruptcy Rule 8002(b). For the reasons expressed in the Arrowhead discussion above, this ruling is reversed.

However, the BAP also analyzed the motion under FRCP 60(b) because Fisher alleged that Jarrett and Clark had committed Fraud and perjury by their testimony at trial. Applying FRCP 60(b), the BAP held the denial of

Fisher's motion for reconsideration to be a final appealable order which allowed the filing of a prospective notice of appeal under Bankruptcy Rule 8002(a). This characterization permitted the BAP to review the denial of the motion without reaching the underlying judgment. The BAP determined that the bankruptcy court did not abuse its discretion by denying Fisher's motion for reconsideration. Fisher has not specifically challenged this ruling on appeal, but seeks only to have us review the merits of his appeal. Therefore, we affirm the BAP's determination under FRCP 60(b), but reverse its holding with regard to FRCP 59(e).[11] We remand this case to the BAP to consider the merits of Fisher's appeal of the judgment setting aside his deed of trust in the Jarretts' property. This was the judgment underlying his motion for reconsideration, but it was not reviewed by the BAP because of the BAP's analysis under Rule 59(e).

CONCLUSION

We hold that the 1991 amendment to Bankruptcy Rule 8002 and the 1993 amendment to FRAP 4(a) provide a sufficient basis for distinguishing Acosta and Sweet Transfer from the present cases. Accordingly, we reverse the BAP's decision to dismiss Arrowhead's appeal, and its decision not to allow Fisher's appeal of the judgment

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[11] While our holding does not upset the BAP's analysis under FRCP 60(b), the BAP may wish to reconsider its holding after evaluation of the merits of Fisher's appeal.

underlying his motion and we remand the appeals for consideration of their merits.

REVERSED.

Supreme Court, U.S.
FILED
MAY 30 1995
CLERK

No. 94-1782

In The

Supreme Court of the United States

October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

RAYMOND E. STACHNIK*
MARK K. THOMAS
AMY A. HIJJAWI
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, IL 60661
312/902-5200

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Has petitioner's appeal in the United States District Court, which seeks review of the Bankruptcy Court's orders denying confirmation of petitioner's fourth amended plan of reorganization and lifting the bankruptcy automatic stay, been mooted by the Bankruptcy Court's dismissal of petitioner's underlying Chapter 11 bankruptcy proceeding?

Has petitioner's appeal been mooted by the consummation and state court confirmation of the foreclosure sale which disposed of petitioner's only asset, i.e., the apartment complex that was the subject of the petitioner's failed plan of reorganization?

Should the District Court have applied Federal Rule of Bankruptcy Procedure 8002(b) as it existed on April 20, 1993, the date petitioner filed its notice of appeal, and on July 15, 1994, the date the District Court disposed of petitioner's appeal, in determining that petitioner's notice of appeal was premature?

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinions and judgments delivered in the courts below have not been published. Accordingly, they are reprinted in the appendix to this brief unless already printed in the appendix to the petition.

STATUTES

Federal Rule of Bankruptcy Procedure 8002(a) and (b) as in effect on April 20, 1993, the date petitioner filed its notice of appeal from the Bankruptcy Court to the District Court, and as in effect on July 15, 1994, the date the District Court dismissed petitioner's appeal provides:

> **(a) Ten-Day Period.** The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

> **(b) Effect of Motion on Time for Appeal.** If a timely motion is filed by any party: (1) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) under Rule 9023 to alter or amend the judgment; or (3) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reports the District Court's and the Tenth Circuit's disposition of petitioner's appeal of the Bankruptcy Court's orders denying confirmation of petitioner's fourth amended plan and lifting the automatic stay. The petitioner's statement, however, is otherwise misleading because it omits material facts which mandate denial of this petition for writ of certiorari.

Background

Petitioner is a former single-asset Chapter 11 debtor who, despite lingering in bankruptcy for nearly four years, was unable to confirm a plan of reorganization. On October 2, 1992, one year and seven months after petitioner filed its Chapter 11 petition, the Bankruptcy Court lifted the automatic stay to allow respondent to foreclose on petitioner's sole asset, an apartment complex in which

petitioner had no equity and in which petitioner invested a mere $300. *App. A.* Upon petitioner's motion, however, the Bankruptcy Court modified its order on October 20, 1992 and, although it allowed respondent to proceed to judgment in its foreclosure action, the Bankruptcy Court enjoined respondent from conducting a foreclosure sale. *App. B.*

On April 2, 1993, the Bankruptcy Court denied confirmation of petitioner's fourth amended plan or reorganization and unconditionally lifted the automatic stay. *App. C.* Petitioner filed a motion for reconsideration which the Bankruptcy Court orally denied on April 13, 1993. The Bankruptcy Court, however, did not enter its judgment on the motion for reconsideration until April 21, 1993. *App. D.* On April 20, 1993, petitioner filed its notice of appeal of the Bankruptcy Court's orders denying confirmation and lifting the stay to the District Court and moved, in the Bankruptcy Court, for a stay pending appeal of the orders denying confirmation and lifting the stay. On May 13, 1993, the Bankruptcy Court granted petitioner's motion for stay pending appeal. *App. E.*

Petitioner's Appeal

On July 15, 1994, over one year later, the District Court dismissed petitioner's appeal because, pursuant to Fed. R. Bankr. P. 8002(b), petitioner's notice of appeal was premature. Petitioner appealed the dismissal to the Tenth Circuit. Petitioner simultaneously moved for a stay pending appeal in the Bankruptcy Court, the District Court and the Tenth Circuit. Both the Bankruptcy Court and the Tenth Circuit granted petitioner's request for stay. *App. F*

and G. On December 28, 1994, the Tenth Circuit affirmed the District Court's decision dismissing petitioner's appeal. *Petitioner's App. A.* Petitioner petitioned the Tenth Circuit for rehearing on January 10, 1995.

Petitioner's Requests For Injunctive Relief

On January 20, 1995, petitioner filed in the Bankruptcy Court a complaint for a temporary and permanent injunction staying the foreclosure sale and a motion for authority to sell the property. *App. H and I.* After notice and a hearing, the Bankruptcy Court denied petitioner's motion to sell the property and denied petitioner's request for injunctive relief on February 8, 1995. *App. J and K.* Petitioner did not appeal the Bankruptcy Court's denial of injunctive relief. Also on February 8, 1995, the Tenth Circuit denied the petition for rehearing. *Petitioner's App. B.* The Tenth Circuit issued its mandate on February 16, 1995. Accordingly, respondent published notice of and scheduled the foreclosure sale for March 15, 1995.

Petitioner then moved this Court and the Tenth Circuit to recall and stay the mandate pending review of its petition for writ of certiorari. *App. L and M.* The petitioner informed both courts that absent a stay, the foreclosure sale would moot petitioner's appeal and petitioner would lose its rights in the property. On March 15, 1995, this Court denied petitioner's request for recall and to stay mandate. On March 20, 1995, the Tenth Circuit denied petitioner's request for recall and to stay the mandate.

The Foreclosure Sale and Dismissal of Petitioner's Bankruptcy Case

The foreclosure sale which petitioner frustrated for over four years was finally consummated on March 15, 1995. Moreover, the Bankruptcy Court dismissed petitioner's Chapter 11 bankruptcy proceeding on March 15, 1995 and the Kansas state court confirmed the foreclosure sale on March 27, 1995. *App. N and P.* Petitioner did not file its petition for writ of certiorari until April 28, 1995. Petitioner did not appeal either the Bankruptcy Court's order dismissing the bankruptcy case or the state court's order confirming the foreclosure sale. Finally, at no time from April 2, 1993 (the date the Bankruptcy Court denied confirmation of petitioner's fourth amended plan of reorganization) through March 15, 1995 (the date the Bankruptcy Court dismissed petitioner's bankruptcy proceeding), did petitioner ever attempt to present a confirmable plan of reorganization. Petitioner, instead, chose to engage in appellate litigation.

Petitioner's appeal is moot. Even if this Court were to reverse the Tenth Circuit and order the District Court to consider petitioner's appeal of the Bankruptcy Court orders denying confirmation of petitioner's fourth amended plan and lifting the automatic stay, there is no longer an underlying bankruptcy case in which to confirm any plan, there is no longer any bankruptcy automatic stay to reinstate, and there is no longer any asset with which to reorganize. Accordingly, the petition for writ of certiorari should be denied.

REASONS THE COURT SHOULD DENY THE PETITION

I. Petitioner's Appeal of the Orders Denying Confirmation and Lifting the Automatic Stay Is Moot.

"[W]hen a debtor fails to obtain a stay pending appeal of a bankruptcy court's or District Court's order lifting the automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal." *In re Matos*, 790 F.2d 864, 865-6 (11th Cir. 1986); *see also, Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325, 1327 (11th Cir. 1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1295 (11th Cir. 1984); *In re Shaw*, 16 B.R. 875, 876-7 (9th Cir. 1982); *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir. 1981); *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1389-90 (5th Cir. 1989); *In re Royal Properties, Inc.*, 621 F.2d 984, 986-7 (9th Cir. 1980). This rule of law applies even where the purchaser is a party to the appeal and is intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process. *Shaw*, 16 B.R. at 877; *Greylock*, 656 F.2d at 4; *Massey*, 763 F.2d at 1327; *Matos*, 790 F.2d at 866; *Sewanee*, 735 F.2d at 1295.[1]

Here, petitioner requested a stay pending appeal from three different courts. Petitioner fully informed each of the courts that the apartment complex was its only

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[1] Respondent notes that petitioner has completely failed to even mention the well-settled and long standing body of law which uniformly holds that a foreclosure sale renders moot any appeal much less advance a good-faith argument as to why that law should not apply to this petition.

asset and that consummation of the scheduled foreclosure sale would moot its appeal and thwart its hope of reorganizing. Despite such information and despite petitioner's pleas, each and every court declined to grant petitioner any further injunctive relief and allowed the foreclosure sale to proceed. And, on March 27, 1995, the Kansas state court confirmed the sale, thereby finally ending petitioner's seemingly infinite and financially draining appeals.[2]

Petitioner's intentional omission of facts which indisputably establish that petitioner's appeal is moot should not be tolerated. Petitioner defaulted on a $10,850,000 loan over four-and-a-half years ago. Respondent has been forced to spend tens of thousands of dollars litigating, as this petitioner has bounced its cause from court to court. Now petitioner appears before this Court and fails to disclose facts and cite law essential to the consideration of the instant petition for writ of certiorari. Petitioner's conduct must not be countenanced, and its petition should be summarily denied.

II. Even If Petitioner's Appeal Is Not Moot, Its Petition For Writ Of Certiorari Should Be Denied.

Petitioner filed its appeal of the orders denying confirmation and lifting stay in the District Court on April 20, 1993. The District Court considered and disposed of

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[2] Respondent will spare the Court the litany of petitioner's numerous appeals but simply notes that petitioner has taken at least three separate appeals all the way to the Tenth Circuit during the course of its single asset Chapter 11 proceeding.

petitioner's appeal on July 15, 1994. On both of those dates, Federal Rule of Bankruptcy Procedure 8002(b) provided that a notice of appeal filed after announcement but before entry of judgment on a motion for reconsideration was premature and ineffective and that a new notice of appeal must be filed to invoke appellate jurisdiction. Because petitioner filed its notice of appeal prior to entry of the Bankruptcy Court's order denying petitioner's motion to reconsider, the District Court properly dismissed petitioner's appeal for lack of jurisdiction.

The District Court's interpretation of Rule 8002(b) was consistent with, indeed mandated by, this Court's ruling in *Acosta v. Louisiana Dept. of Health and Human Resources*, 478 U.S. 251 (1986) (under "the plain wording of the Rules," a notice of appeal filed after announcement but before entry of judgment on motion for reconsideration was premature and ineffective; dismissal of appeal upheld). The District Court's interpretation was also required under the Tenth Circuit's ruling in *Allen v. Horinek*, which, in accordance with *Acosta*, affirmed the dismissal of an appeal because the appellant filed her notice of appeal after announcement but prior to entry of judgment on a post-trial motion. *Allen*, 827 F.2d 672, 672-3 (10th Cir. 1987). Not surprisingly, therefore, the Tenth Circuit affirmed the District Court's dismissal of petitioner's appeal and correctly concluded that the only version of Rule 8002(b) that applied to petitioner's notice of appeal was the version in effect at the time petitioner filed its notice. Logic and the concept of appellate jurisdiction precludes any other conclusion.

A notice of appeal, and only a notice of appeal, invokes appellate jurisdiction. Under the rules as they existed at the time petitioner filed its notice, petitioner could only invoke appellate jurisdiction by filing its notice of appeal within ten days after entry of judgment on its motion for reconsideration. Once those ten days elapsed, petitioner lost its right to appellate review and no appellate court could thereafter exercise jurisdiction over petitioner's attempted appeal. Since petitioner did not file a notice of appeal within the prescribed 10-day period, the District Court simply did not have the power to consider the merits of petitioner's appeal. Indeed, one could argue that an "appeal on the merits" never came into existence because petitioner's premature notice failed to "create" any appeal.

Petitioner argues that the District Court and the Tenth Circuit, like the Ninth Circuit, should have ignored *Acosta* and *Allen* and applied the amended version of Rule 8002(b), even though that version was not in effect at the time petitioner filed its notice of appeal or at the time the District Court dismissed the appeal. Petitioner, of course, cites no authority for the notion that a court has the power to disregard existing statutes and binding precedent in anticipation of future law. Such a notion is absurd. Although petitioner argues that such anticipatory application of amended Rule 8002(b) was necessary to eliminate the trap for an unsuspecting litigant who files a notice of appeal before judgment is entered on a post-trial motion, petitioner fails to explain how it could have been "trapped" in 1993 when *Acosta* was decided in 1986 and *Allen* was decided in 1987. For seven years, Congress allowed *Acosta* to stand as the law of the land on the

instant issue. That was the prerogative of Congress and the District Court had no power to change the effect of that decision on a notice of appeal filed in April 1993.

Finally, contrary to petitioner's claim, the Ninth Circuit's ruling in *In re Arrowhead*, 43 F.3d 1306 (9th Cir. 1994) was not a result of any application of amended Rule 8002(b). The Ninth Circuit, in fact, applied the pre-1994 version of Rule 8002 in determining that the appellant's notice of appeal was not premature. *Arrowhead*, 43 F.3d at 1310. The Ninth Circuit, however, applied paragraph (a) of old Rule 8002 rather than paragraph (b). *Id.* Paragraph (a) (which was not amended in 1994) addresses premature notices of appeal in actions where there has been no post-trial motion. In that context, a premature notice of appeal is treated as though it were filed on the date the judgment was actually entered. It is paragraph (b), however, that addresses actions in which a post-trial motion has been filed. And, old paragraph (b), provides that a notice of appeal filed prior to entry of judgment on the post-trial motion shall have no effect and, therefore, a new notice of appeal must be filed to invoke appellate jurisdiction.

The Ninth Circuit justified its expansive interpretation of old Rule 8002 by claiming that its reading of the bankruptcy rule should be consistent with the amended version of F.R.A.P. 4(a)(4), even though the parallel amendment to Rule 8002 had not yet taken effect. *Id. at 1311.* Thus, the Ninth Circuit relied on paragraph (a) of old Rule 8002 and the amended version of F.R.A.P. 4(a)(4), not on the proposed amendment, in reaching its decision. The Ninth Circuit's application of paragraph (a) to a notice of appeal filed in an action where a post-trial

motion has been filed eviscerates paragraph (b) and, frankly, renders the 1994 amendment to paragraph (b) superfluous. And, the Ninth Circuit's application of F.R.A.P. 4(a)(4) to a bankruptcy appeal renders the Federal Rules of Bankruptcy Procedure superfluous.

Thus, although the Ninth Circuit made note of the proposed amendment to Rule 8002(b), the proposed amendment was not the basis for the court's ruling and it is clear from the court's opinion that it would have reached the same conclusion even without the prospect of the amendment. Indisputably, the Ninth Circuit erred in applying paragraph (a) rather than paragraph (b) of old Rule 8002 and, for whatever reason, the *Arrowhead* litigants chose not to appeal the court's decision. The Ninth Circuit's error, however, does not constitute a split in the circuits on the instant issue.

Even if there is some split between the Tenth and Ninth Circuits, resolution of any split will have little, if any, impact on current bankruptcy appellate litigation since it is unlikely that any bankruptcy appeals in which this precise jurisdictional issue has arisen are still pending. Given all of the above, and the fact that petitioner's appeal is moot, there are simply no "special and important reasons" to grant the petition. The Court should deny this petition.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RAYMOND E. STACHNIK*
MARK K. THOMAS
AMY A. HIJJAWI
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, IL 60661
312/902-5200

Counsel of Respondent

*Counsel of Record

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	)	
	)	NO. 91-40410-11
WISTON XXIV LIMITED, PARTNERSHIP	)	CHAPTER 11
	)	
DEBTOR(S).	)	
	)	

ORDER GRANTING STAY RELIEF

This matter is before the Court for decision on creditor Balcor Pension Investment V's motion for stay relief. Balcor appears by counsel Jonathan Margolies and Michael Molinaro. The debtor appears by counsel William H. Zimmerman, Jr. The Court has reviewed the relevant pleadings and is now ready to rule.

The debtor filed this case on March 1, 1991. On June 28, it sought an extension of the exclusivity period, which Balcor opposed. On July 16, the United States Trustee filed a motion for an order setting a deadline for filing a plan. On August 8, the Court extended exclusivity for a few days, and was informed an agreed order was circulating to resolve the Trustee's motion by fixing October 1 as the date for filing. The debtor filed its original plan on August 9; the agreed order was never filed, presumably because it was moot.

The confirmation process went on, and the debtor amended both its disclosure statement and its plan at least once. On September 15, 1992, the Court denied

confirmation of the debtor's proposed plan of reorganization for various reasons. The debtor has not asked for time to amend that plan or to file a different one.

Meanwhile, Balcor had asked for stay relief on November 9, 1991, and the debtor opposed the request. After Balcor waived the thirty-day requirement under § 362, the Court held a hearing on the motion in January and ultimately denied the motion without prejudice. Balcor claimed it was entitled to stay relief because, among other things, the debtor had no equity in the Villa Medici apartment complex and the complex was not necessary to an effective reorganization. The Court subsequently determined the value of the complex is indeed less than the amount of Balcor's claim, so the debtor has no equity in it. Balcor renewed its motion for stay relief on August 7, 1992, and consideration of the motion was coupled with the hearing on confirmation of the debtor's plan. Now that the Court has determined the debtor's plan is not confirmable despite the debtor's efforts to make the plan satisfy the requirements of the Code, and considering the length of time the case has been pending, the prior efforts to establish a deadline for filing a plan, the debtor's failure to ask for an opportunity to amend this plan or file another one, and the debtor's lack of equity in the property, the Court concludes that cause exists to grant stay relief to Balcor. Balcor's motion is therefore granted.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 2nd day of October, 1992.

/s/ James A. Pusateri
JAMES A. PUSATERI
BANKRUPTCY JUDGE

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
AT TOPEKA

In Re:	)	Case No.
WISTON XXIV LIMITED PARTNERSHIP,	)	91-40410-11
Debtor.	)	

ORDER MODIFYING RELIEF FROM THE STAY

(Filed Oct. 20, 1992)

On October 13, 1992, the Court conducted a hearing on a Motion filed by Wiston XXIV Limited Partnership, Debtor ("Debtor"), seeking to vacate the Court's Order of October 2, 1992 granting relief from the automatic stay to Balcor Pension Investors V ("Balcor"). The Debtor, its General Partner and Balcor appeared by counsel. Western Resources, formerly Kansas Gas & Electric, also appeared by counsel. After hearing argument of counsel, the Court makes the following order modifying the relief previously granted.

The Order granting relief from the automatic stay to Balcor remains in effect and is modified as follows:

A. Balcor is authorized to proceed to prosecute its civil action filed in Johnson County District Court styled *Balcor Pension Investors V v. Wiston XXIV Limited Partnership et al.*, Case No. 92 C 11570 ("State Court Action"), to judgment, provided that Balcor shall not commence, conduct, schedule or advertise a foreclosure sale without further order of this Court.

B. The Receiver appointed in the State Court Action is authorized to supervise and oversee the management, operation, and maintenance of the property owned by the Debtor. The Receiver is not authorized to contact any of the tenants or to make direct collection of the rents. The Receiver is to receive and deposit, at interest, in a segregated account, those funds remaining after the payment of the ordinary and necessary expenses of operation, which Debtor is to promptly remit.

C. Debtor is to provide a Receiver with a budget on a monthly basis. If the Receiver objects to any expenditure contained in the budget, he is to advise the Debtor promptly. If the parties are unable to resolve the dispute concerning the expenditure, then the Debtor may file an appropriate pleading before this Court.

D. Debtor remains in possession and control of the funds accrued to the date of this hearing. Those funds may be spent by the Debtor in accordance with previous budgets filed with this Court and for purposes of extraordinary maintenance of the property where such expenditures were previously budgeted or approved by the Court, without prejudice to Balcor's right to object to such expenditures. The Debtor must request authority of the court for any unbudgeted expenditures from the fund in its possession, without prejudice to Balcor's right to object to such expenditures. The Receiver has no authority to control the utilization of these funds.

E. The Court is aware that Debtor has filed an Amended Plan and Amended Disclosure Statement in

response to the Court's previous Order denying confirmation. The Court will consider expedited hearings provided the parties notify the Clerk of the Court that the Disclosure Statement as to its adequacy is agreeable to Debtor and Balcor.

SO ORDERED this 19 day of October, 1992.

/s/ James A. Pusateri
U.S. BANKRUPTCY JUDGE

APPROVED AS TO FORM:

SHUGHART THOMSON & KILROY, P.C.

/s/ Joel Pelofsky
JOEL PELOFSKY #17929
120 W. 12th St., Suite 1700
Kansas City, MO 64105
(816) 421-3355
ATTORNEY FOR THE DEBTOR

McDOWELL, RICE & SMITH

/s/ Jonathan Margolies
JONATHAN MARGOLIES
120 W. 12th St., Suite 1300
Kansas City, MO 64105
(816) 221-5400
ATTORNEY FOR BALCOR

DIXON & DIXON

/s/ Harry D. Dixon, Jr.
HARRY DIXON
One First National Center
Sixteenth & Dodge Streets, Suite 1800
Omaha, NE 68102
ATTORNEY FOR THE GENERAL PARTNER

Copy mailed by First Class Mail
the 10-20-92
to debtor(s), attorney of record,
U.S. Trustee and movant's attorney

/s/ B. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	)	
	)	NO. 91-40410-11
WISTON XXIV LIMITED, PARTNERSHIP	)	CHAPTER 11
	)	
DEBTOR(S).	)	
	)	

MEMORANDUM OF DECISION

This case is before the Court to determine whether the debtor's plan of reorganization should be confirmed. The debtor appears by counsel William H. Zimmerman and Joel Pelofsky, Balcor Pension Investors V appears by counsel Jonathan A. Margolies, Michael Molinaro and Mark Thomas. Robert Thompson and Wiston Management Company appear by Clifton Jessup and Harry Dixon. Western Resources, Inc. (f/k/a KPL), appears by Douglas Peterson and John DeCoursey. The J.C. Nichols Company appears by Andrew F. Sears. The United States Trustee appears by Assistant U.S. Trustee Jeffrey Rockett.

INTRODUCTION

This is a single-asset case in which numerous issues have been litigated between the debtor and its mortgagee, Balcor Pension Investors V (Balcor), while the case has been pending before this Court. The debtor's asset is an apartment complex in Johnson County, Kansas. After approval of the debtor's sixth amended disclosure statement, the case came before the Court on March 2, 1993,

for consideration of the confirmation of the debtor's fourth amended plan of reorganization.

A threshhold problem immediately arose at that hearing. Balcor had filed an objection to confirmation of the debtor's plan and, among other things, objected to the classification of Merchants Bank, a creditor secured by a second mortgage on the apartment complex, in a class by itself. This class was the only impaired class which had accepted the debtor's plan, and so confirmation might have been impossible if the Court sustained Balcor's objection. *See 11 U.S.C.A. §1129(a)(8) and (b)(1).* The Court in fact did sustain Balcor's objection to Merchants' classification, holding that the bank was a wholly unsecured creditor because Balcor's first mortgage was undersecured, and that the debtor had shown no valid basis for separating Merchants from the other unsecured creditors. This eliminated the only impaired class which had voted favorably for the debtor's plan. Merchants's claim was moved into the class of unsecured creditors, previously consisting of only two voting claim holders, one of whom was Kansas Power & Light, recently renamed "Western Resources" (KPL). KPL had voted to reject the plan. The addition of Merchants to this class meant two of the voting creditors in the class had accepted the plan, so the one-half in number portion of §1126(c) was satisfied for the class, but KPL's claim constituted 38% of the amount of the voting creditors' claims, so the two thirds in amount portion of the statute was not satisfied.

However, reacting to perceived improprieties in Balcor's pre-voting activities, the debtor moved to "designate" KPL under §1126(e) as an entity whose rejection of the plan had been solicited or procured in bad faith. If the

Court designates KPL, its vote will not count for purposes of determining under §1126(c) whether the class has accepted the plan, and the class would accept the plan. If not, there would still be no impaired class that has accepted the debtor's plan.

The Court heard evidence on all the confirmation requirements of §1129(a) and (b), but adjourned the hearing until March 24, 1993, to provide an opportunity for discovery and the presentation of evidence on the debtor's motion to designate KPL. The hearing reconvened and was concluded on march 24, 1993. The Court is now ready to make its rulings.

FACTS AND CONCLUSIONS ON DESIGNATION

During this chapter 11 proceeding, the debtor made post-petition payments to two creditors, Merchants Bank and KPL. As indicated previously, Merchants held a second mortgage on the debtor's apartment complex. Apparently intending to provide adequate protection, the debtor made payments to Merchants for a period of about 18 months and then stopped. KPL had an agreement with the debtor which purports to be a lease of a 500-ton Hitachi chiller/heater and related equipment. The debtor made payments for a period of 18 months as though the agreement were a true lease and then stopped.

Initially, the debtor treated Merchants' claim as being fully secured by the second mortgage on the debtor's real property. Subsequently, the debtor awakened to the fact that Merchants was instead wholly unsecured because the value of the property was less than the amount of

Balcor's first mortgage. The debtor may have been motivated to pay Merchants because its general partner guaranteed the debt to the bank. The debtor initially intended to pay KPL as a lessor. It apparently later determined that the lease was a disguised secured transaction and began treating the claim as secured. Finally, it discovered that KPL had not filed a financing statement, and so began treating the claim as unsecured. In any event, about 18 months into the case, the debtor ceased making postpetition payments to the two creditors and began treating them as unsecured creditors in subsequent amendments to its plan. Before the vote on the debtor's fourth amended plan, KPL had either failed to vote or voted to accept the plan. Those plans had provided full payment to KPL over a period of five years after confirmation. The fourth amended plan also provides for full payment to KPL, but it proposes making no payments to KPL for the first 18 months, paying interest only for the next 18 months, and then amortizes KPL's principal and interest over the next seven years. KPL rejected this plan.

Balcor has objected to each of the debtor's six disclosure statements and four plans on a number of grounds. It complained about treating Merchants' and KPL's claims as secured, asserting that they were unsecured. It further objected to the debtor's failure to try to recover the postpetition payments made to these creditors because it claims the money used to pay them was its cash collateral, arising from the apartment rental payments which comprise essentially all of the debtor's gross revenues. Because the Court indicated in an order signed September 15, 1992, that it agreed with Balcor's

objection that the postpetition payments to these creditors, now thought to be unsecured, were unauthorized and thus possibly violated 11 U.S.C.A. §549, the debtor changed its treatment of KPL and Merchants under the plan and proposed to allow them to retain the payments made postpetition as advance principal payments on their unsecured claims. In addition, at least with respect to KPL, although the debtor's fourth plan did not completely rule out a §549 action against KPL, it indicated that the debtor intended to recover the improper payments through recoupment rather than litigation because, since the claim was to be paid in full under the plan, costly litigation, even if successful, would merely temporarily recover money that would then be repaid to KPL. It appears that the debtor believed the 18 months without payments followed by 18 more months where only interest was paid would make KPL's treatment equal to the treatment of the other unsecured creditors who are to be paid over time under the plan.

After the debtor mailed its fourth plan to creditors for voting, Balcor contacted KPL and began negotiations which ultimately resulted in an agreement between the two creditors. As written, the agreement states that if Balcor obtains title to the apartment complex or if a sale of the complex occurs through Balcor's pending foreclosure action, KPL would give Balcor all of its rights in the 500-ton chiller/heater unit at the complex in exchange for $105,000 and Balcor's promise not to seek recovery of the debtor's improper postpetition payments to KPL, about $80,000, and to return such payments if someone else (a bankruptcy trustee, for example) recovered them for Balcor. Although this provision is not

stated in the contract, Balcor conditioned its acceptance of the agreement on KPL voting to reject the debtor's plan. Counsel for KPL expressed concern that the written agreement and the condition precedent set by Balcor might cause a designation of its vote but was assured by Balcor's counsel that everything would be all right. KPL had not determined how it was going to vote until after Balcor offered this agreement. Balcor held the contract without signing it until it was assured by KPL that it had in fact voted against the debtor's plan.

At the time the agreement was made, Balcor was unaware of the actual value of the equipment, had seen the "lease" agreement between the debtor and KPL, knew that it had a perfected security interest which covered the equipment if KPL's agreement with the debtor was not a true lease, was aware that KPL had not objected to its treatment under the debtor's plan as an unsecured creditor, and was aware KPL had not claimed to have a security agreement or a filed financing statement covering the equipment. It should have been aware, then, that its perfected security interest in the equipment would have priority over KPL's interest if the "lease" was actually intended as security. *See K.S.A. 84-9-102(2); K.S.A. 1992 Supp. 84-9-301(1)(a).* While KPL's agreement with the debtor is called a "lease" and reserves title in KPL throughout the term of the agreement, a number of things about the "lease" indicate it was actually a disguised secured transaction. *See K.S.A. 1992 Supp. 84-9-201a(37) (defining "security interest" and indicating "lease" may create security interest rather than constitute true lease); see also K.S.A. 1992 Supp. 84-9-201(37) (new definition of "security interest" with more extensive rules about when a lease is*

intended as security). For example, the agreement indicates that KPL bought the equipment for the debtor at the cost of $265,720.74, including applicable sales taxes, and that the debtor's "lease" payments were calculated by amortizing that principal amount plus interest at one percent over a certain bank's prime rate (adjustable annually) over the seven-year term of the "lease." The debtor could buy the equipment at any time for the principal balance then remaining due under that amortization schedule plus any accrued interest, or at the end of the lease term for one dollar. The evidence showed the useful life of this equipment is twenty-three years, its current estimated value is in excess of $100,000, and it has been well-maintained.

Balcor argues that it made the agreement with KPL for purely economic reasons, not to buy KPL's vote in hopes of defeating a reorganization plan Balcor opposed. Purportedly Balcor was worried about having a dispute with KPL over the ownership of the Hitachi unit in the event Balcor obtained possession of the complex. Obviously, the unit was needed to supply the heating and air conditioning needs of the apartment complex. Thus, according to Balcor, it decided to enter into the agreement with KPL to resolve this potential dispute without litigation and assure Balcor would become the owner of the Hitachi unit. Although Balcor concedes it did require KPL to vote against the debtor's plan to validate the agreement, Balcor contends it did so only to ensure that its negotiators would not look foolish; the foolish appearance would allegedly result from making an agreement ensuring ownership of the Hitachi unit if the debtor failed to gain approval of its plan with an entity which

then voted to accept the debtor's plan that provided for full payment to all creditors and which Balcor opposed. Balcor's counsel assured the Court that this is sound corporate logic, but the Court does not understand the reasoning. If the agreement was a purely economic decision, then its timing is suspect and the condition precedent was unnecessary. If it was a purely economic decision, then Balcor should not have been concerned about KPL's exercise of its own economic judgment. Balcor's written words say, "Let us come to an agreement so that if I come into possession there will be peace between us," but its actual posture when the unwritten condition precedent is added says, "Help me get into possession and I'll make peace with you." Even KPL's counsel, a self-professed bankruptcy novice, questioned the propriety of Balcor's action.

In sum, the dispute started with the debtor making postpetition transfers to Merchants and KPL which it probably thought were appropriate when it made them, but which were not authorized by the Court and were probably not in the ordinary course of the debtor's business. The funds which the debtor used to make the payments were not at the time considered to be Balcor's cash collateral, but now are, following a decision on appeal. Balcor objected to the transfers the debtor made and insisted that the debtor correct the problem of the unauthorized postpetition use of its cash collateral. Before Balcor made this objection, the debtor had reached an agreement with KPL concerning its treatment under the plan, but as a result of Balcor's objection and the Court's comment thereon in its September 1992 order, the debtor changed its plan to treat the postpetition transfers

as prepayments of principal, and to extend the length of KPL's payout from five to ten years. Balcor then approached KPL and promised that if KPL would vote against the debtor's plan and Balcor thereafter came into possession of the apartment complex, Balcor would not attempt to recover from KPL the $80,000 or so of improperly transferred cash collateral and would also pay KPL an additional $105,000 in return for KPL's release of any claim it might have to the Hitachi equipment. Based on these facts, the debtor contends Balcor solicited or procured KPL's plan rejection in bad faith.

The Court concludes that the KPL should be designated as an entity whose rejection of the plan was solicited or procured in bad faith in violation of § 1126(e), and so its vote should not be counted under §1126(c) in determining whether the class of claims which includes KPL's claim accepted the debtor's plan. Unquestionably, KPL acted in its own interest in accepting the deal with Balcor. If the debtor's plan is defeated, KPL will receive $105,000 in cash and forgiveness of probably improper postpetition transfers of $80,000 to $85,000 of what is currently considered Balcor's cash collateral. However, had Balcor not insisted on a negative vote, it is conceivable that KPL might have voted in favor of the plan, which would pay its total claim over time, and still made the agreement with Balcor in case the plan was not confirmed. Either way, KPL would avoid §549 litigation and be paid a large portion of its claim, despite the improper payments and the questionable status of its "lease."

Instead, by agreeing to reject the plan, KPL gave up only the chance that its accepting vote would have allowed it to be paid somewhat more money by the

debtor over a number of years and its claim to ownership of the Hitachi equipment under its lease with the debtor – a claim it had already waived for purposes of the debtor's plan, presumably because the "lease," though not yet declared a disguised secured transaction, has many of the earmarks that this and other courts have relied on to find a lease to be intended as security rather than a true lease. *See, e.g., Atlas industries, Inc. v. National Cash Register Co., 216 Kan. 213, 217-21 (1975); see also B. Clark, The Law of Secured Transactions Under the Uniform Commercial Code, ¶¶1.05[3] and [4] (2nd ed. 1988) (extensive analysis of case law).* Balcor obtained a blocking vote for the unsecured class, by objecting successfully to Merchants' separate classification and obtaining KPL's vote, though Balcor claims it was not aware that it was a blocking vote. In fact, under the circumstances the Court finds it hard to believe Balcor made the agreement to pay 19/24ths of KPL's claim solely to resolve a purportedly disputed issue – whether KPL's agreement was a true lease or disguised secured transaction – which KPL had already conceded for purposes of the debtor's plan by failing to object to its classification under the plan as an unsecured creditor. It seems much more likely Balcor had a dual purpose, part of which was to purchase KPL's vote without advancing money to buy its claim. In essence, through its objections to the debtor's dealings with KPL, Balcor forced the debtor to propose a method of recovering the postpetition payments it had made to KPL, and then Balcor promised to forgive the inappropriate transfers and pay KPL an additional $105,000 Balcor would almost certainly not have to pay in exchange for a vote

against the debtor's plan. Balcor's actions constitute bad faith solicitation or procurement of KPL's vote.

FACTS AND CONCLUSIONS ON FEASIBILITY

In addition to the objections discussed above, Balcor also objected to the debtor's plan because it is not feasible, does not meet the best interest of creditors test, was not proposed in good faith, and does not pay Balcor the present value of its claim. More specifically, Balcor complains (1) the plan simply delays the debtor's loss of the property in hopes the value of the apartment complex will increase enough to pay all the claims while a management company controlled by the debtor's general partner receives a fee of five percent of the gross proceeds from the complex; (2) Balcor is the only entity at risk, since the equity holders have invested little or no capital in the debtor and will not invest much under the plan; (3) Balcor is not receiving as much as it would get if the debtor were liquidated; (4) the interest rate offered is below the market rate; and (5) the complex generates insufficient cash flow to fund the debtor's plan, as shown by the pre- and postpetition operating deficits. Given various amendments to the plan that the debtor has proposed during the hearings on confirmation, Balcor also contends the debtor has unfairly made its plan a moving target. Finally, Balcor has asked for further stay relief to proceed to judgment and sale in a foreclosure action that the Court previously gave it partial stay relief to pursue after the debtor failed to obtain confirmation of an earlier plan.

The debtor's current plan proposes to pay Balcor as a creditor secured by real property and cash collateral valued at $11.6 million. The debtor wants to amortize $10.6 million over thirty years at 8.5% interest, with a balloon payment coming due after ten years for the full balance then owed. The real property has a value of $10.3 million. The remainder of Balcor's security is the cash collateral represented by the accrued net rents. Some of that cash collateral, however, was paid to KPL and Merchants, as mentioned previously, and thus exists only as a §549 claim against those creditors; the remainder has been deposited in the debtor's bank accounts. The debtor's plan says the debtor will pay $1,000,000 of this money to Balcor at confirmation and use the remainder in its cash flow.

During the debtor's March 2, 1993, presentation, the debtor offered to turn over to Balcor at confirmation an additional $138,000 of the cash collateral in order to assure Balcor that its cash collateral would not be used to pay other creditors during the first year of the plan. The debtor also disclosed that under an agreement with new prospective limited partners, it had just received $300,000 which was being held in escrow until the escrow agent was notified the debtor's plan had been confirmed and several other rather minor conditions were met. This disclosure necessitated a further hearing the following day so the debtor could prove the money was in the escrow account and the terms of its release; Balcor objected to such a presentation, but the Court allowed it. During these hearings, the debtor referred to "the remaining cash collateral," apparently meaning the

amounts that might be recovered from KPL and Merchants under §549, not actual cash. At the hearing on March 24, during closing argument by the parties, the Court asked how Balcor was to be protected with respect to the missing cash collateral, the so-called "remainder" of its security. The debtor's counsel replied that, though he did not have present authority from his client, he would propose that the amount of the missing cash collateral would be fully paid to Balcor from the escrowed money. In addition, counsel volunteered that the management company controlled by the debtor's general partner would forego receipt of its five percent commission until Balcor was paid each month and that certain insurance proceeds might exceed the cost of roof repairs, making the excess available for other purposes.

The Court notes that none of these last-minute proposals are included in the debtor's disclosure statement or plan. The disclosure statement declares on page 19 that the entire amount of the insurance recovery must be used to make the roof repairs in order to maintain the value of the property. In addition, the debtor's plan also calls for the debtor's general partner to contribute $100,000 during the first two years of the plan. The general partner testified that he does not currently have $100,000 in cash to contribute, and did not indicate how he would get the money. Thus, there is no guarantee that the money will be forthcoming, especially if the management company he controls would for any reason have to forego its five percent commission in order to assure payment to Balcor.

As filed, the debtor's plan does not demonstrate that its income will be sufficient to pay its expenses plus the payments due under the plan. The general partner's

promise to pay $100,000 cash to the debtor in the next two years is not supported by proof he has any tangible means of satisfying that promise. Without his contribution, the plan shows a negative cash flow, even assuming everything else goes as the debtor has projected and the Court rules in the debtor's favor on all pending disputes. On average, over the months from September 1992 through February 1993, the occupancy level of the apartment complex has not met the debtor's projections, causing a decrease in gross income and a further increase in the expected negative cash flow. If the new $300,000 is diluted by paying a substantial portion of it for cash collateral reimbursement, its remaining addition to the debtor's cash flow may still be insufficient. If it is not used to replenish Balcor's cash collateral, then Balcor's secured claim would be jeopardized. In fact, since the Court had required the debtor to segregate the rents and obtain permission before using them to pay any non-ordinary expensee [sic] even before it was ruled the rents were Balcor's cash collateral, the amount of the missing cash collateral might constitute an administrative expense, pursuant to §§507(b), 361, and 363, which would have to be paid in full on the effective date of the plan, as required by §1129(a)(9). Thus, as written, the debtor's plan is not feasible.

The quick fixes suggested by counsel – the subordination of the management fees to at least the payments to be made to Balcor, the use of some of the insurance money for operations rather than for repairs, the use of the new investors' money for repayment of a cash collateral shortfall – either do not comply with the plan, do not comply with the escrow agreement, or reduce the general

partner's ability to raise the funds he promises to invest in the reorganized debtor. The proposed changes in the plan and in the use of the escrowed money would require notice to the affected parties before they could be implemented. Having determined that the plan as filed is not feasible and so not confirmable and that all or a good part of the suggested modifications cannot be made without notice to the affected parties, the Court declines to address any remaining issues.

The debtor's plan is not confirmable. The case has been on file for two years, during which time the debtor has filed four plans and six disclosure statements, without obtaining confirmation. The time has come to give Balcor complete stay relief to proceed with its foreclosure action. Separate judgments will be entered to make final the decisions rendered herein on designation, confirmation, and stay relief.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure.

Dated at Topeka, Kansas, this 2d day of April 1993.

/s/ James A. Pusateri
JAMES A. PUSATERI
BANKRUPTCY JUDGE

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
WISTON XXIV LIMITED PARTNERSHIP	)	Case No. 91-40410
	)	Chapter 11
Debtor.	)	

ORDER ON MOTION FOR RECONSIDERATION

(Filed Apr. 21, 1993)

THIS MATTER came to be heard on the Debtor's Motion under Rule 9023, Rules of Bankruptcy Procedure for Reconsideration of Order Denying Confirmation and Lifting Stay and for Stay under Rule 8005, Rules of Bankruptcy Procedure Pending Hearing of Motion and/or Pending Appeal (the "Motion") and, after consideration of arguments of counsel and the prior proceedings in this case,

THE COURT FINDS AS FOLLOWS:

1. This Chapter 11 proceeding has been on file for over two years, during which time the Debtor has filed five plans of reorganization and six disclosure statements without obtaining confirmation. This is a single asset real estate case in which the Villa Medici Apartment Complex and its related property (the "Property") constitutes the Debtor's sole asset.

2. On April 2, 1993, the Court entered its Memorandum of Decision and Judgment Denying Confirmation (the "Judgment") of the Debtor's Fourth Amended Plan of Reorganization (the "Plan") and Judgment Granting

Stay Relief. The denial of confirmation of the Plan was based, among other things, on the Court's finding that the Plan was not feasible and that the Plan was not fair and equitable with respect to the treatment of the secured claim of Balcor Pension Investors V ("Balcor"). The Court found that the cash flow projections upon which the Plan was based would either be insufficient to make payments required under the Plan or that the Plan's cash flow projections did not have a sufficient cushion in the event that any of the assumptions underlying the projections proved erroneous.

3. In the Motion, Debtor requests the Court to reconsider the Judgment denying confirmation of the Plan and also to stay Balcor from proceeding with its pending state court foreclosure action. The Motion contends that the Plan is feasible and that the Debtor can prove that the projected cash flow is sufficient to satisfy the Plan's obligations. In support of the Motion, an offer of proof was made to the Court with respect to certain exhibits purportedly demonstrating the feasibility of the Plan and the availability of new investor funds to finance the Plan. Debtor's counsel admitted on the record that no "new evidence" is contained in the offers of proof relating to the Plan's purported feasibility. An offer of proof was also made relating to funds available from new investors (the "Funds"), which offer of proof established that the infusion of the Funds is still conditioned upon a *final and non-appealable* order confirming the Plan. Balcor has made it clear that it will appeal any order confirming the Plan; thus, the Funds will not be available under the Plan until any such appeals are finally resolved.

4. The Court found that the Plan was not feasible because, among other things, the Funds were not proposed to be paid to Balcor pursuant to the written Plan under consideration at the confirmation hearing. Moreover, the escrow agreement governing the Funds did not provide that the Funds were to be paid to Balcor pursuant to the Plan. Finally, since it is clear that the Funds will not be available to the Debtor if Balcor appeals any order confirming the Plan, the Funds cannot be treated as available under the Plan for feasibility or other purposes.

5. The Plan's feasibility was further impaired because the Plan required capital infusions totalling $100,000. The general partner, Robert Thompson, however, testified that he did not presently possess the funds necessary to make the $100,000 infusion required under the Plan. Moreover, there is no guarantee that the $100,000 infusion would ever be made. Again, to the extent that this $100,000 infusion is encompassed by the Funds, the Funds are not available until an order confirming the Plan is non-appealable. Debtor attempted to orally modify the Plan, at the confirmation hearing, to provide that the management company controlled by the general partner would, if necessary, waive or subordinate its management fee. This proposal, however, was not part of the written Plan presented for consideration at the confirmation hearing, and the proposal casts further doubt upon the Debtor's receipt of the required $100,000 infusion.

6. The Court declines to accept the offer of proof regarding the Funds because such evidence does not constitute newly discovered evidence, such evidence could have been presented at the confirmation hearing,

and the Plan does not provide that the Funds will be paid to Balcor. The Court will accept the offer of proof regarding the financial exhibits, based upon Debtor's counsel's representation that such exhibits merely constitute further recapitulation of financial data and cash flow figures previously presented at the confirmation hearing. Such offer of proof, however, is of limited significance and the Court remains unpersuaded by the Debtor's contentions that the Plan is feasible.

7. The Plan's proposed treatment of Balcor's secured claim is not fair and equitable. Under the Plan, Debtor proposes to pay Balcor a secured claim of approximately $10,600,000, although Balcor would only retain a lien upon Property having a value of $10,300,000. Accordingly, the written Plan presented did not protect $300,000 of Balcor's secured claim, and did not provide adequate protection of that portion of Balcor's secured claim.

8. The recent performance of the Property casts severe doubt upon the Property's ability to meet the Plan's projection's that 1993 income would total $1,860,000, and casts severe doubt upon the Plan's ability to generate positive cash flow even if the projected income was reached. In conclusion, at the end of the confirmation hearing on the written Plan there were too many unanswered questions regarding the feasibility of the Plan. To confirm the Plan, the Court would have been forced to speculate on the answers to too many crucial questions, such as the Property's cash flow, the Property's occupancy rates, the availability of the Funds, and the availability of the $100,000 infusion. Additionally, the Court would have been forced to resolve all considerations and questions in favor of the Debtor. The cash flow

projections are so thin that the Court does not believe the Plan is feasible. The Debtor has failed to meet its burden regarding the feasibility of the Plan.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the foregoing constitutes the findings of fact and conclusions of law required by Bankruptcy Rule 7052 and Federal Rule of Civil Procedure 52.

Dated this 20 day of April, 1993.

/s/ James A. Pusateri
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
AT TOPEKA

In Re:	)	
	)	Case No.
WISTON XXIV LIMITED PARTNERSHIP	)	91-40410-11
	)	
Debtor.	)	

ORDER SUSTAINING DEBTOR'S
MOTION FOR STAY PENDING APPEAL

(Filed May 13, 1993)

On April 2, 1993, this court denied confirmation of Debtor's Fourth Amended Plan of Reorganization. A timely motion for reconsideration was filed and denied. On April 20, 1993, Debtor filed a timely notice of appeal of the Order Denying Confirmation and also filed a motion for a stay pending appeal.

Argument on the motion for stay was conducted by teleconference on April 29, 1993. Debtor appeared by William Zimmerman and Joel Pelofsky and general partner Robert L. Thompson. Balcor Pension Investors V ("Balcor"), the creditor holding a mortgage on Debtor's real and personal property, appeared by Michael Molinaro, Mark Thomas and Jonathan Margolies. Debtor's general partners appeared by Harry Dixon. Western Resources, an unsecured creditor, appeared by Douglas Peterson. The United States Trustee appeared by Richard Wieland. The Court has heard and considered the statements and argument of counsel and has taken judicial notice of the entire file including consideration of

Debtor's Motion for Stay Pending Appeal ("Motion") and Debtor's brief in support of the Motion as well as Balcor's memorandum in opposition to the Motion.

Rule 8005, Rules of Bankruptcy Procedure, provides, in part, that "the bankruptcy judge may suspend or order the continuance of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of the parties in interest."

The criteria by which the court evaluates the propriety of a stay on appeal are well established. They are:

1. Substantial likelihood that the party seeking a stay will prevail on the merits in its appeal.

2. Whether movant will suffer irreparable harm if the stay is not allowed.

3. Proof that the threatened injury to the movant outweighs whatever damage the proposed stay may cause the opposing party.

4. Lack of harm to the public interest.

U.S. v. Enterprise Management Consultants, 883 F.2d 886, 889 (10th Cir. 1989).

The subject matter of this case is an apartment complex located in Johnson County, Kansas. The parties in interest are the owners, the secured creditor and several unsecured creditors. The property will continue to be operated during the pendency of the appeal. There has been no showing of harm to any public interest and the Court finds that no such harm exists.

Debtor asserts that it will raise three issues on appeal. These are the characterization of the post-petition rents as cash collateral, the addition of segregated rents to the value of Balcor's secured claim and the denial of confirmation based upon feasibility. The issue of cash collateral turns on the question of whether Balcor had so perfected its interest in rents by pre-petition acts that the trustee or Debtor-in-Possession in the case could not assert a superior interest. This Court found that Balcor was not so perfected. This Court finds that there is substantial likelihood that movant will eventually prevail on the merits on this question. Should Debtor prevail on this question, Balcor suffers a reduction of over $1,300,000.00 to its secured claim and Debtor has an opportunity to use this money without concern for adequate protection.

Movant will suffer irreparable harm if the stay is not granted. Balcor will foreclose on the real property and Debtor will be unable to reorganize. The property will be lost and Debtor will not be able to bring it back into the estate. Only a stay in this Court will permit Debtor to retain the property and its possibility of reorganization.

The stay will not cause substantial harm to other parties. The stay preserves Debtor's opportunity to reorganize, and benefits the unsecured creditors who otherwise would have little prospect of being paid. Balcor's interest is not the only one deserving of protection. Debtor proposes, and is hereby ordered, to surrender operation of the property to Balcor or its designee. Thereafter all the cash generated from the complex, after expenses, will be paid over to Balcor on a monthly basis. The Court finds conservatively that Balcor will receive about 7% return on its loan, a return well above that

available on the commercial market. The Court also finds, from the evidence presented during the case that there is little likelihood that the property will suffer a loss in value during the pendency of the appeal. Control of the property will enable Balcor to minimize the possibility of loss of value and diminution of cash flow.

Balcor also contends that the stay will deprive it of the unfettered opportunity to sell the real estate for any price it chooses. The Court will permit, as a condition of the stay, the property to be marketed for $10,300,000.00, the value assigned to the property by the Court. Debtor is required to offer the property for sale at that price. Balcor, at its discretion, may offer the property for sale at the same price. The parties are to report any offers to each other and may move the Court for approval of such offer. No offer shall be considered evidence of value in any further hearing or on any issue in this case.

In addition, the Court hereby orders Debtor to post a bond in the sum of $50,000.00, payable to Balcor to pay awarded costs of appeal, if any, and damages, if any, awarded by this Court to Balcor resulting from the Stay. This bond must be posted on or before close of business on May 6, 1993. On failure of Debtor to post the bond before said deadline, Balcor may immediately proceed to sheriff's sale of its action to foreclose.

The foreclosure sale now scheduled for Friday, April 30, 1993 is stayed pending appeal provided that Debtor posts the bond hereinabove described and otherwise complies with the terms and conditions of this Order.

The Motion for Stay is sustained. This Order shall be effective as of April 29, 1993. Further, this Order shall be

without prejudice to the rights of Balcor to seek additional protection of its interest in the property upon cause shown.

SO ORDERED this 6 day of May 1993.

/s/ James A. Pusateri
U.S. BANKRUPTCY JUDGE

SUBMITTED AND APPROVED:

By /s/ Donald H. Loudon
JOEL PELOFSKY MO #17929
DONALD H. LOUDON MO #18802
SHUGHART THOMSON & KILROY
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

JAMES P. O'HARA, KS #11548
SHUGHART THOMSON & KILROY
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355

ATTORNEYS FOR DEBTOR

APPENDIX F

IN THE UNITED STATES BANKRUPTCY
FOR THE DISTRICT OF KANSAS

In re:	)	
	)	CASE NO.
WISTON XXIV LIMITED PARTNERSHIP,	)	91-40410-11
	)	CHAPTER 11
DEBTOR.	)	
	)	

ORDER

On August 11, 1994, the debtor filed a motion seeking clarification of the current status of a stay pending appeal entered by the Court on May 13, 1994. The parties have requested a telephone conference. The Court finds argument unnecessary.

The Court finds that though the appeal in this proceeding has been ruled upon by the District Court, the appellate order is not final as a motion for rehearing has apparently been timely filed. *See Bankruptcy Rule 8015.* The situation is analogous to that recited in Fed R. Civ. P. 76(b), wherein the appellate decision of the District Court is stayed pending disposition of a petition for rehearing.

IT IS THEREFORE ORDERED that the stay previously entered is in effect until the order on the petition for rehearing is final or the stay is otherwise vacated.

IT IS SO ORDERED.

Dated at Topeka, Kansas this 18th day of August, 1994.

/s/ James A. Pusateri
HONORABLE
JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: WISTON XXIV LIMITED PARTNERSHIP Debtor,	)	
BALCOR PENSION INVESTORS, Plaintiff/Appellee/ Cross-Appellant	)	No. 94-3281
v.	)	
WISTON XXIV LIMITED PARTNERSHIP, Defendant/Appellant Cross-Appellee.	)	

ORDER
(Filed Aug. 23, 1994)

Before MOORE and BALDOCK, Circuit Judges.

Wiston XXIV Limited Partnership, debtor in the underlying bankruptcy proceedings, seeks a stay pending appeal of the district court's order dismissing its appeal to that court from an order of the bankruptcy court. The bankruptcy court denied confirmation of Wiston's proposed reorganization plan and granted Balcor Pension Investors relief from the automatic stay. Upon Wiston's appeal to the district court, however, the bankruptcy

court granted a stay pending appeal, ordering Wiston to comply with certain specified conditions. That stay was dissolved by the district court's order dismissing Wiston's appeal for lack of jurisdiction. Wiston has appealed the district court's order. At stake is Wiston's principal asset, an apartment complex in Johnson County, Kansas, which has been scheduled for sale on August 24, 1994.

After careful consideration of Wiston's motion for stay and Balcor's response, it is ordered as follows:

1. The motion for stay pending appeal is granted, conditioned upon continuation of the terms established by the bankruptcy court in its order filed May 13, 1993. If a new bond is required, Wiston will post the bond within ten days of this order.

2. The briefs filed in connection with this matter, i.e., Wiston's motion for stay and Balcor's response, shall be considered as the opening brief and response brief in Wiston's appeal of the district court's dismissal order. Wiston will be allowed ten days from the date of this order to file a reply brief.

3. The appeal will be expedited and oral argument shall be scheduled for the next available calendar.

Entered for the Court

PATRICK FISHER,
Chief Deputy Clerk

By: /s/ Barbara Schermerhorn
Barbara Schermerhorn
Deputy Clerk

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
AT TOPEKA

WISTON XXIV LIMITED PARTNERSHIP Plaintiff, v. BALCOR PENSION INVESTORS, Defendant.	)	Case No. _____

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION STAYING SHERIFF'S SALE

For its complaints for temporary restraining order for preliminary and permanent injunction staying sheriff's sale of the real estate owned by the Debtor, Debtor states as follows:

1. This Chapter 11 reorganization case was filed in 1991.

2. The court has jurisdiction of this complaint under the provisions of § 157 and 131 of Title 28 in § 105 of Title 11, U.S.C.

3. In its stay order of May 13, 1993, the court stated that it would entertain an order for the sale of the property at $10,300,000, the value the court found in previous hearings in this bankruptcy case.

4. In a separate motion, Debtor has presented to the court a bona fide offer for the sale of the real property

owned by the estate for the sum of $10,300,000. Some additional time is required to close the transaction.

5. As result of the order of the Court of Appeals for the Tenth Circuit affirming the District Court's dismissal of its appeal, Debtor is faced with an imminent sale of its substantial asset on February 1, 1995.

6. Debtor has filed a timely motion for rehearing with the Court of Appeals for the Tenth Circuit, thus staying the mandate under the provisions of Rule 41, Federal Rules of Appellant [sic] Procedure.

7. Neither the stay order entered by this court nor the stay order granted by the Court of Appeals for the Tenth Circuit has a termination date. Debtor represents to the court that the stay issued by the Tenth Circuit remains in effect until the mandate is issued. Therefore, the sale of the real estate by the secured creditor through a sheriff sale is premature and may be in violation of the stay.

8. If the sale is allowed to proceed, Debtor will suffer irreparable harm.

9. The real properties are being managed by a receiver for the benefit of the Debtor and of the secured creditor. The bond required by this court as a condition of the stay remains in place. No prejudice will accrue to the secured creditor by reason of an injunction prohibiting this sale pending the closing of the sale set out in the motion which has been filed herewith.

10. Debtor has no adequate remedy at law.

WHEREFORE, Debtor moves the court for a temporary restraining order, for an order setting a time for a

hearing on a preliminary injunction and for such other relief as may be appropriate.

SHUGHART THOMSON
& KILROY

/s/ Joel Pelofsky
JOEL PELOFSKY #17929
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Fax: (816) 374-0509

ATTORNEY FOR DEBTOR

I hereby certify that a copy of the foregoing was mailed postage prepaid this 20th day of January, 1995 to:

Jonathan A. Margolies, Esq.
McDowell, Rise & Smith
120 W. 12th St., Suite 1300
Kansas City, MO 64105

Michael L. Molinaro, Esq.
Katten, Muchin & Zavis
525 W. Monroe St., Suite 1600
Chicago, IL 60661

Mr. Daniel M. Runion
Western Resources, Inc.
818 Kansas Avenue
P.O. Box 889
Topeka, KS 66601

/s/ Joel Pelofsky
Attorney for Debtor

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
AT TOPEKA

In Re:	)	
	)	
WISTON XXIV LIMITED PARTNERSHIP	)	Case No. 91-40410-11
	)	
Debtor.	)	

MOTION FOR SALE OF REAL PROPERTY OF THE ESTATE UNDER SECTION 363, FREE AND CLEAR OF LIENS

For its motion for the sale of real property of the estate under the provisions of § 363 of the Bankruptcy Code, Title 11, U.S.C., Debtor states as follows:

1. This bankruptcy reorganization case was filed in 1991. At this time, the real property in the estate is managed by a receiver on behalf of the Debtor and the secured creditor. Title to the real property remains in the Debtor.

2. In the early part of 1993, this court denied confirmation of the Debtor's plan of reorganization, finding that the plan was not feasible in view of the character of the rents as part of a secured creditor's cash collateral. An appeal was filed.

3. That appeal to the District Court was dismissed as being filed prematurely. An appeal was taken to the Court of Appeals for the Tenth Circuit. On December 28, 1994, the appellate panel affirmed the order of the District Court dismissing the appeal.

4. The Bankruptcy Court issued a stay on May 13, 1993 conditioned upon the property being managed by a receiver and the Debtor posting a bond in the sum of $50,000. That bond was posted.

5. On August 23, 1994, the Tenth Circuit Court of appeals issued a stay, conditioned upon "continuation of the terms established by the Bankruptcy Court in its order filed May 13, 1993." No termination date was established for that stay.

6. In the Bankruptcy Court order of stay, the Bankruptcy Court authorized the Debtor in possession or the secured creditor [sic] sell the principal asset of the estate for the sum of Ten Million Three Hundred Thousand Dollars ($10,300,000).

7. Debtor has a bona fide offer for the sale of the property at the price established by the Bankruptcy Court. The secured creditor has declined to accept any such offer.

8. The sale of this asset of the estate is in the best interests of the Debtor and all parties and interests. On information and belief, Debtor states that the secured creditor has been receiving the rents of the property since May of 1993 and that those rents have been sufficient to pay the interest and some principal on the outstanding balance due the secured creditor. There may be, therefore, some funds remaining after satisfaction of the secured claim to pay administrative costs and the claims of unsecured creditors of the estate.

9. The sale of the real estate outside the provisions of a confirmed plan is in the best interest of the estate and will not result in prejudice to any party.

WHEREFORE, Debtor moves the court for an order approving sale of the real estate owned by the Debtor, free and clear of liens, transferring the liens of the secured creditor of the proceeds of the sale, for an order re-instituting the automatic stay and for such other relief as to the court may seem appropriate.

SHUGHART THOMSON & KILROY

/s/ Joel Pelofsky
JOEL PELOFSKY #17929
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Fax: (816) 374-0509

ATTORNEY FOR DEBTOR

I hereby certify that a copy of the foregoing was mailed postage prepaid this 20th day of January, 1995 to:

Jonathan A. Margolies, Esq.
McDowell, Rise & Smith
120 W. 12th St., Suite 1300
Kansas City, MO 64105

Michael L. Molinaro, Esq.
Katten, Muchin & Zavis
525 W. Monroe St., Suite 1600
Chicago, IL 60661

Mr. Daniel M. Runion
Western Resources, Inc.
818 Kansas Avenue
P.O. Box 889
Topeka, KS 66601

/s/ Joel Pelofsky
Attorney for Debtor

APPENDIX J

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS AT TOPEKA

In Re:	)	
	)	
WISTON XXIV LIMITED PARTNERSHIP,	)	Case No. 91-40410-11
	)	
Debtor.	)	
	)	

ORDER DENYING MOTION FOR SALE OF REAL PROPERTY OF THE ESTATE UNDER SECTION 363, FREE AND CLEAR OF LIENS

(Filed Feb. 7, 1995)

This matter came to be heard on the Debtor's Motion For Sale of Real Property of the Estate Under Section 363, Free and Clear of Liens (the "Motion"), the Court having reviewed the Motion, the Court having reviewed the Response of Balcor Pension Investors V to the Motion, the Court having reviewed the correspondence attached to the Motion, the Court having conducted a hearing on the Motion on January 30, 1995 (the "Hearing"), the Court having heard arguments of counsel for the Debtor and for Balcor Pension Investors V at the Hearing, and the Court otherwise being fully advised in the premises,

IT IS HEREBY ORDERED THAT, for the reasons stated in open Court at the Hearing, the Motion is denied.

ENTERED:

/s/ James A. Pusateri
UNITED STATES
BANKRUPTCY COURT

APPENDIX K

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS AT TOPEKA

IN RE:	)	Case No.
	)	91-40410-11
WISTON XXIV LIMITED PARTNERSHIP	)	
	)	
Debtor.	)	
	)	
WISTON XXIV LIMITED PARTNERSHIP,	)	Adv. No.
	)	95-7013
Plaintiff,	)	
	)	
v.	)	
	)	
BALCOR PENSION INVESTORS [sic],	)	
	)	
Defendant.	)	

ORDER DENYING COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION STAYING SHERIFF'S SALE

(Filed Feb. 8, 1995)

This matter came to be heard upon the Debtor's Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction Staying Sheriff's Sale (the "Complaint"), the Court having reviewed the Complaint, the Court having reviewed the Answer of Balcor Pension Investors V to the Complaint, the Court having conducted a hearing on the relief requested in the Complaint on January 30, 1995 (the "Hearing"), the Court having heard argument of counsel at the Hearing, and the Court otherwise being fully advised in the Premises,

IT IS HEREBY ORDERED THAT, for the reasons set forth in open Court at the Hearing, all relief requested in the Complaint is hereby denied as being moot.

ENTER:

/s/ James A. Pusateri
UNITED STATES
BANKRUPTCY COURT

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WISTON XXIV LIMITED PARTNERSHIP,	)	
Appellant,	)	Case No. 94-3281
v.	)	
BALCOR PENSION INVESTORS V,	)	
Appellee.	)	

APPELLANT'S MOTION TO RECALL AND STAY THE MANDATE PENDING REVIEW BY WRIT OF CERTIORARI

Appellant Wiston XXIV Limited Partnership ("Wiston") moves the Court to recall and stay its mandate for twenty (20) days pending filing by appellant of a petition for a writ of certiorari to review the Court's December 28, 1994 decision and thereafter pending ruling of said petition. *See* Fed. R. App. P. 41(b). As grounds for this motion, Wiston states:

1. On December 28, 1994, this Court affirmed the decision of the district court that Wiston's notice of appeal from the bankruptcy court was ineffective because it was filed after the bankruptcy court orally announced its decision, but before that decision was formally entered on the docket sheet. Wiston's petition for a rehearing and suggestions for a rehearing en banc was denied by an order entered on February 8, 1995. The mandate was issued on February 16, 1995.

2. After the mandate was issued, counsel for Wiston learned that the United States Court of Appeals for the Ninth Circuit reached the opposite result in a case involving virtually identical facts. *See In re Arrowhead Estates Dev. Co.*, 42 F.3d 1306 (9th Cir. 1994). The issue presented in these conflicting decisions is worthy of the Supreme Court's attention pursuant to Supreme Court Rule 10. Wiston plans to file a petition for writ of certiorari on this issue as soon as possible.

3. The property at issue in the instant case is scheduled to be sold at auction on March 15, 1995. If the Court's mandate is not recalled and stayed pending Wiston's filing of a petition for writ of certiorari, the issue in this case will become ineffective to preserve Wiston's property rights and Wiston will suffer irreparable harm.

4. Appellee Balcor Pension Investors V will not suffer any prejudice through a grant of a stay. In any event, even if Balcor can somehow claim prejudice, it will be far outweighed by the prejudice to Wiston if it is not allowed to pursue all avenues of appeal.

5. Pursuant to Tenth Circuit Rule 27.3, counsel for Wiston has conferred with counsel for Balcor regarding its position on the motion. Balcor's position is opposed to any further delay based on a statement of its counsel.

For the above reasons and as fully set forth in the attached suggestions in support of this motion, Wiston requests that the Court recall and stay its mandate for 20

days pending filing by appellant of a petition for a writ of certiorari and thereafter pending ruling of said petition.

/s/ Donald H. Loudon
DONALD H. LOUDON
Mo. #18802
THOMAS A. SHEEHAN
Mo. #36462
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

ATTORNEYS FOR APPELLANT WISTON XXIV LIMITED PARTNERSHIP

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 8th day of March, 1995, to:

Harry D. Dixon, Jr.
Dixon & Dixon Ltd. L.L.P.
1800 First National Center
Sixteenth & Dodge Streets
Omaha, Nebraska 68102

Jonathan A. Margolies
McDowell, Rice & Smith
1300 Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105-1932

Daniel M. Runion
818 Kansas Avenue
P. O. Box 889
Topeka, Kansas 66601

Michael L. Molinaro (via UPS Next Day Air in addition to regular U.S. mail and Ms. Hijjawi has been alerted to expect receipt)
Mark K. Thomas
Amy A. Hijjawi
Katten Muchin & Zavis
525 West Monroe Street
Suite 1600
Chicago, Illinois 60661-3693

Steve Rebein
600 Security Bank Building
Seventh & Minnesota
Kansas City, Kansas 66101

/s/ Donald H. Loudon
Attorney for Appellee

APPENDIX M

No. ___

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

APPLICATION TO RECALL AND STAY MANDATE OF THE TENTH CIRCUIT COURT OF APPEALS PENDING REVIEW BY WRIT OF CERTIORARI

To The Honorable Ruth Badar Ginsburg, Justice of the United States Supreme Court and Circuit Justice for the Tenth Circuit:

Petitioner Wiston XXIV Limited Partnership respectfully moves for an order recalling and staying the mandate issued in this case on February 16, 1995, by the United States Court of Appeals for the Tenth Circuit. A sale is scheduled for 10:00 a.m. central time tomorrow, which will cause irreparable harm to petitioner. Petitioner will promptly file a petition for writ of certiorari seeking review of the Tenth Circuit's unpublished opinion (attached hereto), which affirmed the judgment of the district court dismissing petitioner's appeal from the bankruptcy court for lack of appellate jurisdiction.

Petitioner has exhausted all possibilities of securing a recall and stay of the mandate from the Court below. The Tenth Circuit issued the mandate on February 16, 1995.

Petitioner filed a motion for recall and stay with the Court on March 9, 1995. As of 3:00 p.m. central time today, the Tenth Circuit had not ruled [sic] petitioner's motion. Wiston's assets are scheduled to be sold at auction at 10:00 a.m. central time tomorrow. If the mandate is not recalled and stayed, the sale will render Wiston's petition for writ of certiorari ineffective in preserving its property rights, and will cause irreparable harm to Wiston.

(a) Procedural History of this Case

• On April 2, 1994, the United States Bankruptcy Court for the District of Kansas issued a memorandum decision rejecting petitioner's Fourth Amended Plan of Reorganization. Petitioner timely filed a motion for reconsideration, whcih [sic] the court orally denied on April 13, 1994. On April 20, 1994, petitioner filed a notice of appeal to the United States District Court for the District of Kansas. On the following day, the bankruptcy court entered its order overruling petitioner's motion for reconsideration on the docket sheet.

• On July 15, 1994, the district court dismissed petitioner's appeal for lack of appellate jurisdiction. Petitioner timely appealed that decision to the United States Court of Appeals for the Tenth Circuit.

• The Tenth Circuit affirmed, holding that Wiston's notice of appeal was ineffective because it was filed after the bankruptcy court orally denied Wiston's motion for reconsideration, but before the order was formally entered on the docket sheet. The court focused on the affective [sic] date of the new Bankruptcy Rule 8002 and

rejected Wiston's argument that the policy embodied in new Fed. R. App. P. 4(a) should control.

• The Tenth Circuit overruled petitioner's motion for rehearing and suggestions for rehearing en banc and, on February 16, 1995, issued its mandate.

• Shortly after the court below issued its mandate, counsel for Wiston learned that the Ninth Circuit Court of Appeals reached the opposite result in *In re Arrowhead Estates Dev. Co.*, 42 F.3d 1306 (9th Cir. 1994), just two days after the Tenth Circuit reached its decision. The Ninth Circuit, on virtually identical facts, held that a notice of appeal filed after the trial court announced its ruling, but before it formally entered it on the docket sheet was valid. The court held that the validity of the notice of appeal was to be determined by application of the recent 1993 amendment to Fed. R. App. P. 4(a), regardless of the effective date of the amendments to Bankruptcy Rule 8002.

• Petitioner's motion to recall and stay mandate has not been ruled by the Tenth Circuit.

(b) Standards for Granting Relief

The Court has authority to recall and stay the mandate pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23. The Court should exercise its authority here because (1) there is a "reasonable probability" that four justices will consider the issue presented sufficiently meritorious to grant certiorari; (2) there is a "fair prospect" that a majority of the Court will conclude that the Tenth Circuit's decision was erroneous; (3) irreparable harm

will result if relief is not granted; and (4) the equities favor granting relief in this case. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Petitioner satisfies these requirements.

First, the direct conflict between the Tenth Circuit and the Ninth Circuit presents an issue likely to be resolved by writ of certiorari. *See* Supreme Court Rule 10 (considerations governing review on writ of certiorari include "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter"). The decision below is in direct conflict with a decision of the Ninth Circuit Court of Appeals on an issue of national importance involving the application, interpretation of the Federal Rules of Appellate Procedure and Rules of the Bankruptcy Court.

Second, by promulgating new Fed. R. App. P. 4(a), effective December 1, 1993, which would eliminate the harsh result reached in this case if applicable, the Court has indicated that cases should be decided on the merits rather than on procedural grounds. This rule change suggests a reasonable probability that Wiston will be successful on the merits.

Third, the property at issue in the instant case is scheduled to be sold at auction at 10:00 a.m. central time on March 15, 1995. If the Tenth Circuit's mandate is not recalled and stayed pending Wiston's filing of a petition for writ of certiorari, Wiston will lose the ability to preserve its business as its assets will be sold at auction. The sale of Wiston's assets will arguably deprive the court of

jurisdiction to entertain a petition for writ of certiorari because no "case or controversy" may exist after the sale.

Fourth, respondent Balcor Pension Investors V will not be prejudiced by the relief requested here. In any event, even if Balcor can somehow claim prejudice, it will be far outweighed by the prejudice to Wiston if it is not allowed to pursue all avenues of appeal.

(c) Conclusions

For the above reasons, Wiston requests that the Court recall and stay the mandate issued by the Tenth Circuit pending review by writ of certiorari.

/s/ _____
DONALD H. LOUDON
Mo. #18802
THOMAS A. SHEEHAN
Mo. #36462
SHUGHART THOMSON &
KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
FAX (816) 374-0509

ATTORNEYS FOR PETITIONER
WISTON XXIV LIMITED
PARTNERSHIP

APPENDIX N

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
	)	Case No.
WISTON XXIV LIMITED PARTNERSHIP	)	91-40410-11
	)	
Debtor(s)	)	
	)	

ORDER DISMISSING CHAPTER 11 PROCEEDING

(Filed Mar. 20, 1995)

NOW ON this 15th day of March, 1995, comes on for hearing the Motion of the United States Trustee to Convert or Dismiss. The debtor appears by and through its counsel, Joel Pelofsky. Balcor Pension Investors V appears by and through counsel, Mark K. Thomas. The United States Trustee appears by and through his attorney, Jeffrey W. Rockett. There are no other appearances.

After hearing statements of counsel and reviewing the Court file the Court finds that this case should be dismissed from Chapter 11 of the United States Bankruptcy Code.

Furthermore, the Court finds that it shall retain jurisdiction over two matters after the dismissal of this bankruptcy proceeding:

1. The matter concerning the Marshall Companies, Inc. and its contentions with Balcor Pension Investments V in and surrounding this debtor and this Chapter 11 proceeding

shall remain under the jurisdiction of this Court for adjudication; and

2. Any and all matters involving administrative claims made against this estate shall remain under the jurisdiction of this Court to allow for proper collection and adjudication.

WHEREFORE, this Chapter 11 proceeding is dismissed with the above cited reservations of jurisdiction.

DATED: March 15, 1995

/s/ James A. Pusateri
UNITED STATES
BANKRUPTCY JUDGE

SUBMITTED BY:

JOHN E. FOULSTON
United States Trustee

DATED: March 9, 1995

By /s/ Jeffrey W. Rockett
JEFFREY W. ROCKETT
Attorney, #14123
401 North Market, Room 180
Wichita, Kansas 67202
316-269-6637

Copy mailed 3-20-92
to debtor(s), attorney of
record and U.S. Trustee all
creditors

/s/ illegible
Deputy Clerk

APPENDIX O

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CIVIL DEPARTMENT

BALCOR PENSION INVESTORS V, an Illinois limited partnership, Plaintiff, vs. WISTON XXIV LIMITED PARTNERSHIP and THE MERCHANTS BANK, Defendants.	Case No. 92 C 11570 Court No. 7 K.S.A. Chapter 60

ORDER CONFIRMING SHERIFF'S SALE

NOW ON this 27th day of March, 1995, the above matter comes on for hearing on Motion of Plaintiff Balcor Pension Investors V for an order confirming sale of real estate made by the Sheriff of Johnson County, Kansas, on the 15th day of March, 1995, under an Order of Sale issued out of the office of the Clerk of the District Court of said County and State on the 17th day of February, 1995, directing the sale of the following-described lands and tenements, to-wit:

> All that part of the Northwest Quarter of Section 4, Township 13, Range 25, in the City of Overland Park, Johnson County, Kansas, more particularly described as follows: Commencing at a point on the North line of said Section 4, said point being 1147.84 feet East from the Northwest corner of said Quarter Section, measured along said North line; thence Southerly along a

line at right angles to said North line a distance of 423.00 feet; thence Westerly along a line at right angles to the last described course a distance of 30.00 feet to the point of beginning of a tract of land to be herein described; thence continuing Westerly along the last described course a distance of 869.96 feet; thence Southerly along a line which deflects to the left 89 Degrees 59 Minutes 00 Seconds from the last described course a distance of 569.24 feet; thence Westerly along a line at right angles to the last described course a distance of 206.00 feet; thence Southerly along a line at right angles to the last described course a distance of 155.13 feet; thence continuing Southerly, Southeasterly and Easterly along a curve to the left from the last described course as a tangent, having a radius of 20.00 feet, a distance of 31.37 feet; thence continuing Easterly along a line tangent to the last described curve a distance of 1042.83 feet; thence continuing Easterly, Northeasterly and Northerly along a curve to the left from the last described course as a tangent, having a radius of 20.00 feet, a distance of 32.75 feet; thence continuing Northerly along a line tangent to the last described curve a distance of 5.34 feet; thence continuing Northerly along a curve to the right from the last described course as a tangent, having a radius of 3030.00 feet, a distance of 194.92 feet; thence continuing Northerly along a line tangent to the last described curve a distance of 525.47 feet to the point of beginning.

After being well and duly advised in the premises, and after examining the file and the proceedings of said Sheriff under said Order of Sale, the Court finds that the same has been made in all respects in conformity with

law and equity and the orders of this Court, and having heard all of the evidence and statements of counsel, does hereby approve and confirm said sale and each and all of the proceedings taken in connection therewith and finds that Defendant Wiston XXIV Limited Partnership has duly and validly waived any and all right of redemption under the terms of said mortgage heretofore foreclosed and therefore there should be no period of redemption fixed herein.

The Court further finds that the above-described real property was purchased at said Sheriff's sale by Villa Medici Limited Partnership, assignee of Plaintiff, for the sum of Nine Million and NO/100 Dollars (9,000,000.00), said sum being a portion of the judgment obtained herein by Plaintiff against Defendant Wiston XXIV Limited Partnership and that said sale price is a fair and equitable price for said real property.

IT IS THEREFORE THE ORDER OF THIS COURT that said Motion to Confirm Sheriff's Sale should be and is hereby sustained, and that the Clerk of the District Court is hereby directed to make an entry on Journal of this Court and that this Court is satisfied with the legality of said sale, and that said sale and proceedings be and the same are hereby approved and confirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the proceeds of the sale herein be disbursed forthwith in accordance with the Order of Sale issued herein.

IT IS FURTHER ORDERED that the Sheriff of Johnson County, Kansas, make and execute for Villa Medici

Limited Partnership, purchaser of said lands and tenements hereinafter described at said sale, a good and sufficient Sheriff's Deed for the premises sold, to-wit:

> All that part of the Northwest Quarter of Section 4, Township 13, Range 25, in the City of Overland Park, Johnson County, Kansas, more particularly described as follows: Commencing at a point on the North line of said Section 4, said point being 1147.84 feet East from the Northwest corner of said Quarter Section, measured along said North line; thence Southerly along a line at right angles to said North line a distance of 423.00 feet; thence Westerly along a line at right angles to the last described course a distance of 30.00 feet to the point of beginning of a tract of land to be herein described; thence continuing Westerly along the last described course a distance of 869.96 feet; thence Southerly along a line which deflects to the left 89 Degrees 59 Minutes 00 Seconds from the last described course a distance of 569.24 feet; thence Westerly along a line at right angles to the last described course a distance of 206.00 feet; thence Southerly along a line at right angles to the last described course a distance of 155.13 feet; thence continuing Southerly, Southeasterly and Easterly along a curve to the left from the last described course as a tangent, having a radius of 20.00 feet, a distance of 31.37 feet; thence continuing Easterly along a line tangent to the last described curve a distance of 1042.83 feet; thence continuing Easterly, Northeasterly and Northerly along a curve to the left from the last described course as a tangent, having a radius of 20.00 feet, a distance of 32.75 feet; thence continuing Northerly along a line tangent to the last

described curve a distance of 5.34 feet; thence continuing Northerly along a curve to the right from the last described course as a tangent, having a radius of 3030.00 feet, a distance of 194.92 feet; thence continuing Northerly along a line tangent to the last described curve a distance of 525.47 feet to the point of beginning.

and thereupon such grantee in said deed shall be placed in the immediate and peaceful possession of the real estate by the said Sheriff.

IT IS SO ORDERED. JANICE D. RUSSELL

JUDGE OF THE DISTRICT COURT

Submitted and approved:

McDOWELL, RICE & SMITH, a
Professional Corporation

By /s/ Michael D. Doering
Michael D. Doering #13832
7101 College Blvd., Suite 200
Overland Park, Kansas 66210
(913) 338-5400
(913) 338-1033 Telefax

ATTORNEY FOR PLAINTIFF

SUPREME COURT, U.S.
FILED
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No. 94-1782

In The

Supreme Court of the United States

October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

DONALD H. LOUDON
Counsel of Record
THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Fax: (816) 374-0509

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BALCOR PENSION INVESTORS V,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

Respondent Balcor raises two arguments for denying certiorari. First, it claims that this case is moot because a foreclosure sale has already occurred. Second, it suggests that the Ninth Circuit's conflicting decision in *In re Arrowhead*, 42 F.3d 1306 (9th Cir. 1994), is either distinguishable or in error. Balcor's arguments do not favor denial of the petition.

Balcor offers several federal appellate decisions to support its argument that, because petitioner's property was sold at foreclosure on March 15, 1995, this case is now moot. (Resp't Br. at 6). This supposedly "well-settled

and long standing body of law" applies, says Balcor, even when the purchaser is a party to the appeal. *Id.*

The cases are not as well-settled on this point as Balcor claims. Where, as here, the party purchasing at foreclosure is effectively a party to the appeal[1], Balcor's case law is far less clear. In fact, one Circuit has recognized a specific exception to the mootness doctrine on nearly identical facts. *See In re Sun Valley Ranches, Inc.*, 823 F.2d 1373, 1375 (9th Cir. 1987) (failure to obtain stay, followed by sale of debtor's property, did not moot the debtor's subsequent appeal when the creditor-purchaser was before the court).

Should Wiston ultimately succeed on the merits of its appeal, the "sale" of Wiston's assets could still be reversed because the purchaser of the property is effectively a party to this case. Moreover, Kansas has a statutory redemption period of twelve months under K.S.A. § 60-2414(a) (1994), a factor courts have found important in holding that cases such as the present one are not moot. *See In re Sun Valley Ranches*, 823 F.2d at 1375 (exception to mootness rule "especially appropriate" where the foreclosure sale at issue was subject to statutory right of redemption).

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[1] The property in question was purchased on March 15, 1995, by an Illinois limited partnership known as the "Villa Medici Limited Partnership." This entity has the same business address in Skokie, Illinois, the same registered agent (Balcor Registered Agent, Inc.), and the same individual signing on behalf of the general partner (Jerry M. Ogle) as respondent Balcor.

Balcor's confusing attempt to distinguish *In re Arrowhead* does not succeed. The conflict is clear: the Ninth Circuit's approach in the *Arrowhead* case would have *allowed* the present appeal, while the Tenth Circuit's approach below did not. Balcor itself essentially recognizes the conflict as it falls back to its ultimate position – that the Ninth Circuit case was wrongly decided. (Resp't Br. at 10-11). But Balcor's view on whether the Ninth or Tenth Circuit reached the wrong result is immaterial. A conflict is present, one this Court can quite easily resolve, just as it did with a similar conflict in its *per curiam* decision in *Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1986) (resolving in summary fashion, without briefing or oral argument, conflict over timing of appeals under Fed. R. App. P. 4(a)).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DONALD H. LOUDON
Counsel of Record
THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Fax: (816) 374-0509

Attorneys for Petitioner